TRANSCRIPT OF

SUPREME COURT OF THE

OCTOBER

No. 1078

THE MISSOURI PACIFIC RAILWAY

vs.

OSWALD BAIER, AS

OF KATHERINE

IN ERROR TO THE SUPREME COURT OF THE

FILED

(15,468.)

(15,462.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1078.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

OSWALD BAIER, AS ADMINISTRATOR OF THE ESTATE OF KATHERINE BAIER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nebraska, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Missouri Pacific Railway Company, plaintiff in error, and Oswald Baier, as administrator of the estate of Katherine Baier, deceased, defendant in error, wherein was drawn in question the validity of a statute or an authority exercised under said State of Nebraska, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said The Missouri Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 16th day of December next,

2 to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of November, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER, *Associate Justice.*

3 SUPREME COURT OF NEBRASKA, *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, to wit, the writ of error and copy of bond.

Seal Supreme Court of Nebraska.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Lincoln, this 24th day of November, 1893.

D. A. CAMPBELL, *Clerk.*

4 [Endorsed:] #5271. The Missouri Pacific Railway Company, pl'ff in error, *vs.* Oswald Baier, as administrator of the estate of Katherine Baier, deceased. Writ of error. Supreme court of Nebraska. Filed Nov. 23, 1893. D. A. Campbell, clerk.

5 MISSOURI PACIFIC RAILWAY CO. *v.* OSWALD BAIER, Adm'r. } No. 5271.

Pleas before the supreme court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the third day of January, A. D. 1893.

Present: Honorable Samuel Maxwell, chief justice; Honorable T. L. Norval, Honorable A. M. Post, judges.

Attest: D. A. CAMPBELL, *Clerk.*

Be it remembered that on the 11th day of March, A. D. 1892, there was filed in the office of the clerk of said court a certain petition in error in words and figures following, to wit:

6 In the Supreme Court of the State of Nebraska.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error, *vs.* OSWALD BAIER, Administrator of the Estate of Katherine Baier, Deceased, Defendant in Error.

Petition in Error.

The Missouri Pacific Railway Company, plaintiff in error, avers that on the 19th day of December, A. D. 1891, at the December term, A. D. 1891, of the district court in and for Otoe county, Nebraska, the said defendant in error, by the consideration and judgment of said district court, recovered a judgment against the plaintiff in error, and the said plaintiff in error avers that there was error in the judgment and proceedings of said court in this—a certified transcript of the record thereof is hereto attached as Exhibit "A"—to wit:

1.

The said court erred in overruling the motion of the plaintiff in error to make more definite and certain the petition in said case.

2.

The said court erred in receiving incompetent, irrelevant, and immaterial evidence, in this, to wit: The said court, over the objection and subject to the exceptions of the plaintiff in error, permitted Oswald Baier to testify as to the value of the services of Katherine Baier as an item of damage in said case.

7

3.

The said court erred in permitting the witness Fentsemaker to testify as to the custom of the defendant in the operation of its line of railway prior to the date of the injury to said Katherine Baier.

4.

The said court erred in permitting the witness Johnson to testify as to the statements and declarations of Katherine Baier after said alleged injury.

5.

The said court erred in permitting the said Oswald Baier, without showing any qualification therefor, to testify as to the cause of the death of said Katherine Baier over the objection and subject to the exceptions of the said plaintiff in error.

6.

The said court erred in receiving incompetent, irrelevant, and immaterial evidence over the objections of the said plaintiff in error and subject to its exceptions.

7.

The said court erred in permitting the said Oswald Baier to introduce copies of letters of administration over the objection and subject to the exceptions of the plaintiff in error.

8.

The said court erred in refusing to submit to the jury the several particular questions of fact prepared and requested to be submitted by the plaintiff in error.

8

9.

The said court erred in refusing to instruct the jury that the said plaintiff in the court below could not recover and that the jury should return a verdict for the defendant, as prayed for in instruction number one.

10.

The said court erred in refusing to give instruction number two as prayed for by the plaintiff in error.

11.

The said court erred in refusing to give instruction number three, as prayed for by the plaintiff in error.

12.

The said court erred in refusing to give instruction number four, as prayed for by the plaintiff in error.

13.

The said court erred in refusing to give instruction number five, as prayed for by the plaintiff in error.

14.

The said court erred in refusing to give instruction number six, as prayed for by the plaintiff in error.

13.

The said court erred in refusing to give instruction number seven, as prayed for by the plaintiff in error.

14.

The said court erred in refusing to give instruction number eight, as prayed for by the plaintiff in error.

15.

The said court erred in refusing to give instruction number nine, as prayed for by the plaintiff in error.

9

16.

The said court erred in refusing to give instruction number ten, as prayed for by the plaintiff in error.

17.

The said court erred in refusing to give instruction number eleven, as prayed for by the plaintiff in error.

18.

The said court erred in refusing to give instruction number twelve, as prayed for by the plaintiff in error.

19.

The said court erred in refusing to give instruction number thirteen, as prayed for by the plaintiff in error.

20.

The said court erred in refusing to give instruction number fourteen, as prayed for by the plaintiff in error.

21.

The said court erred in refusing to give instruction number fifteen, as prayed for by the plaintiff in error.

22.

The said court erred in refusing to give instruction number sixteen, as prayed for by the plaintiff in error.

23.

The said court erred in refusing to give instruction number seventeen, as prayed for by the plaintiff in error.

24.

The said court erred in refusing to give instruction number eighteen, as prayed for by the plaintiff in error.

25.

The said court erred in refusing to give instruction number nineteen, as prayed for by the plaintiff in error.

26.

The said court erred in refusing to give instruction number twenty, as prayed for by the plaintiff in error.

27.

The said court erred in refusing to give instruction number twenty-one, as prayed for by the plaintiff in error.

28.

The said court erred in refusing to give instruction number twenty-two, as prayed for by the plaintiff in error.

29.

The said court erred in refusing to give instruction number twenty-three, as prayed for by the plaintiff in error.

30.

The said court erred in refusing to give instruction number twenty-four, as prayed for by the plaintiff in error.

31.

The said court erred in refusing to give instruction number twenty-five, as prayed for by the plaintiff in error.

32.

The said court erred in refusing to give instruction number twenty-six, as prayed for by the plaintiff in error.

33.

The said court erred in refusing to give instruction number twenty-seven, as prayed for by the plaintiff in error.

34.

The said court erred in refusing to give instruction number twenty-eight, as prayed for by the plaintiff in error.

35.

The said court erred in refusing to give instruction number twenty-nine, as prayed for by the plaintiff in error.

36.

The said court erred in refusing to give instruction number thirty, as prayed for by the plaintiff in error.

37.

The said court erred in refusing to give instruction num-
11 ber thirty-one, as prayed for by the plaintiff in error.

38.

The said court erred in refusing to give instruction number thirty-two, as prayed for by the plaintiff in error.

39.

The said court erred in refusing to give instruction number thirty-three, as prayed for by the plaintiff in error.

40.

The said court erred in refusing to give instruction number thirty-four, as prayed for by the plaintiff in error.

41.

The said court erred in refusing to give instruction number thirty-five, as prayed for by the plaintiff in error.

42.

The said court erred in refusing to give instruction number thirty-six, as prayed for by the plaintiff in error.

43.

The said court erred in refusing to give instruction number thirty-seven, as prayed for by the plaintiff in error.

44.

The said court erred in refusing to give instruction number thirty-eight, as prayed for by the plaintiff in error.

45.

The said court erred in refusing to give instruction number thirty-nine, as prayed for by the plaintiff in error.

46.

The said court erred in refusing to give instruction number forty, as prayed for by the plaintiff in error.

47.

The said court erred in refusing to give instruction number forty-one, as prayed for by the plaintiff in error.

12 48.

The said court erred in refusing to give instruction number forty-two, as prayed for by the plaintiff in error.

49.

The said court erred in refusing to give instruction number forty-three, as prayed for by the plaintiff in error.

50.

The said court erred in refusing to give instruction number forty-four, as prayed for by the plaintiff in error.

51.

The said court erred in refusing to give instruction number forty-five, as prayed for by the plaintiff in error.

52.

The said court erred in refusing to give instruction number forty-six, as prayed for by the plaintiff in error.

53.

The said court erred in refusing to give instruction number forty-seven, as prayed for by the plaintiff in error.

54.

The said court erred in refusing to give instruction number forty-eight, as prayed for by the plaintiff in error.

55.

The said court erred in refusing to give instruction number forty-nine, as prayed for by the plaintiff in error.

56.

The said court erred in refusing to give instruction number fifty, as prayed for by the plaintiff in error.

57.

The said court erred in refusing to give instruction number fifty, as prayed for by the plaintiff in error.

58.

13 The said court erred in refusing to give instruction number fifty-one, as prayed for by the plaintiff in error.

59.

The said court erred in refusing to give instruction number fifty-two, as prayed for by the plaintiff in error.

60.

The said court erred in refusing to give instruction number fifty-three, as prayed for by the plaintiff in error.

61.

The said court erred in giving to the jury instruction number one, asked by plaintiff, over the objection and subject to the exception of the defendant.

62.

The said court erred in giving to the jury instruction number two, asked by plaintiff, over the objection and subject to the exception of the defendant.

63.

The said court erred in giving to the jury instruction number three, asked by pl't'ff, over the objection and subject to the exception of the defendant.

64.

The said court erred in giving to the jury instruction number four, asked by pl't'ff, over the objection and subject to the exception of the defendant.

65.

The said court erred in giving to the jury instruction number five, asked by pl't'ff, over the objection and subject to the exception of the defendant.

66.

The said court erred in giving to the jury instruction number six, asked by plaintiff, over the objection and subject to the exception of the defendant.

67.

14 The said court erred in giving to the jury instruction number seven, asked by the plaintiff, over the objection and subject to the exception of the defendant.

68.

The said court erred in giving to the jury instruction number eight, asked by plaintiff, over the objection and subject to the exception of the defendant.

69.

The said court erred in giving to the jury instruction number nine, asked by the plaintiff, over the objection and subject to the exception of the defendant.

70.

The said court erred in giving to the jury instruction number ten, asked by plaintiff, over the objection and subject to the exception of the defendant.

71.

The said court erred in giving to the jury instruction number eleven, asked by plaintiff, over the objection and subject to the exception of the defendant.

72.

The said court erred in giving to the jury instruction number twelve, asked by plaintiff, over the objection and subject to the exception of the defendant.

73.

The said court erred in instructing the jury that if the injury to the said Katherine Baier was the result of an accident the defendant was liable therefor unless such accident was the result of the gross negligence of the said Katherine Baier.

74.

The said court erred by giving instruction number ten, asked by pl't'ff, which took away from the jury as a question of fact whether the deceased, Katherine Baier, was guilty of gross negligence or not and therein told the jury as a matter of law that she was not guilty of such negligence.

75.

The court improperly instructed the jury as to the measure of damage if the said defendant in error was entitled to recover on the evidence.

76.

The said court erred in overruling and denying the motion of the said plaintiff in error for a new trial.

77.

The said court erred in entering judgment for the said defendant in error on the verdict of the jury, because the same was not authorized by the evidence, was against the weight of evidence, and was contrary to law.

78.

Error of law occurring at the trial and duly excepted to by the defendant, the plaintiff in error, at the time.

79.

The said judgment of the court below should have been for the plaintiff in error instead of for the defendant in error.

Wherefore the plaintiff in error prays that the judgment of the court below may be reversed and set aside and the said plaintiff in error restored to all things that it has lost by reason thereof.

B. P. WAGGENER,
Attorneys for Plaintiff in Error,
The Mo. Pacific Railway Company.

16 (Endorsed:) 5271. M. P. R'y Co. *v.* Oswald Baier, adm'r. Petition in error. Supreme court of Nebraska. Filed Mar. 11, 1892. D. A. Campbell, clerk.

And on the same day, to wit, the 11th day of March, A. D. 1892, there was filed in the office of the clerk of said court a certain transcript in words and figures following, to wit:

17 *Transcript.*

STATE OF NEBRASKA, *Otoe County,* } ss:

Pleas before the district court of Otoe county, Nebraska, at a term begun and holden in the county of Otoe on the 23d day of March, 1891, before Sam'l M. Chapman, judge of said district court.

OSWALD BAIER, as Administrator of the Estate of Katherine Baier, Deceased, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant.

Be it remembered that heretofore, to wit, on the 29th day of January, 1891, a petition was filed in the office of the clerk of the district court of Otoe county in the words and figures following, to wit:

In the District Court of Otoe County, Nebraska.

OSWALD BAIER, as Administrator of the Estate of Katherine Baier, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } Petition.

The plaintiff, as administrator aforesaid, complains of the defendant and alleges:

1. That on the 5th day of January, 1891, plaintiff was duly appointed and qualified and letters of administration were issued to him by the county judge of Cass county, Nebraska, on the estate of Katherine Baier, deceased.

2. That defendant is and was at the time hereinafter mentioned a corporation duly incorporated under the laws of the State
18 of Nebraska and owned and operated a railroad known as the "Missouri Pacific railway" and were common carriers of passengers for hire.

3. That on the 26th day of December, 1889, the defendant, in consideration of the sum of $1.65, received said Katherine Baier, then living, as a passenger on said railroad from Nehawka to Lincoln; that at Weeping Water, Nebraska, to continue her aforesaid journey, it was necessary for the said Katherine Baier to change from one of the defendant's train of cars to another, which said trains there made close connection, and the defendant was thereby

bound to furnish her suitable means, time, and instruction to make said change; that the defendant, nevertheless, failed and neglected to do its duty in these matters, and carelessly, negligently, and wrongfully performed its duty towards her in making said change; that the defendant furnished no platform for that purpose; that the ground was three or four feet below the lowest step of said car; that the defendant then and there gave her wrong instructions about making said change and did not give her time to make said change; in consequence whereof and by reason of this that said train stopped at the defendant's water tank before reaching the depot at Weeping Water, and the conductor of said train then and there wrongfully, carelessly, and negligently instructed the said Katherine Baier to get off said train; that said Katherine Baier did get off at that place, and the conductor of said train, finding he had made a mistake, immediately instructed her to get on again, and he, the said conductor, then and there further instructed her to get off said train when the next stop was made; that thereafter said train of cars pulled up to and some distance beyond the depot at said Weeping Water, and the said Katherine Baier, in accordance with instructions aforesaid given to her by said conductor, then and there, upon the stoppage of said train of cars, attempted to get off, but by reason of said train making a sudden jerk while the said
19 Katherine Baier was in the act of leaving said one train to change to the other of said trains for the purposes aforesaid she was, without fault on her part, overset, thrown down, and greatly bruised, strained, injured, and had both of her legs broken, and was for a long time sick and was obliged to have her legs amputated, and she then and there remained and continued sick, weak, and distempered for a long space of time which ensued in consequence of her being overturned and wounded aforesaid, and which continued until the 3rd day of January, 1890, on which last-mentioned date she, the said Katherine Baier, of her said wounds died.

4. That said Katherine Baier left her surviving children as follows: Etta Baier, aged 17; Mary Baier, aged 15 years; Katie Baier, aged 13 years; Emma Baier, aged 10 years; John Baier, aged 7 years; Minnie Baier, aged 5 years, and Willie Baier, aged 2 years, being her only children and next of kin, and said children were dependent on her for a mother's care and attention and have been otherwise injured by the death of said Katherine Baier to the amount of five thousand dollars.

Wherefore plaintiff, as administrator aforesaid, asks judgment against said defendant in said amount of five thousand dollars and for costs of this suit.

JOHN C. WATSON,
H. D. TRAVIS &
E. H. WOOLEY,
Att'ys for Plaintiff.

STATE OF NEBRASKA, } ss:
Otoe County, }

Oswald Baier, being first duly sworn, deposes and says that he is the plaintiff in the above action; that he knows the contents of the foregoing petition, and verily believes the same to be true.

OSWALD BAIER.

Subscribed in my presence and sworn to before me this 12th day of January, 1891.

H. D. TRAVIS,
Notary Public. [SEAL.]

Endorsed: In the district court of Otoe county, Neb. Oswald Baier, administrator estate of Katherine Baier, plaintiff, *vs.* Missouri Pacific Railway Company, defendant. Petition. John C. Watson, H. D. Travis, E. H. Wooley, att'vs for pl'ff. Dist. court Otoe Co., Neb. Received and filed Jan. 29th, 1891. M. S. Campbell, clerk. Gen'l No., 4510.

And afterwards, on the 6th day of April, 1891, there was filed an answer in the office of the clerk of the district court of Otoe county in the words and figures following, to wit:

In the District Court of Otoe County, Nebraska.

OSWALD BAIER, Administrator of the Estate of Katherine Baier, Deceased, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } Answer.

Now comes the said defendant, The Missouri Pacific Railway Company, and for answer to the petition of the plaintiff filed herein says:

1. It admits that it is a corporation, but denies each and every other statement, averment, and allegation in said petition contained.

2. For further answer defendant says that if the said Catherine Baier received the injuries alleged in said petition the same were the result solely of her own negligence and carelessness and failure to exercise reasonable and ordinary care and diligence and not by reason of any negligence or carelessness on the part of the said defendant or its employees; that said Catherine Baier attempted
21 to leave the train of said defendant when the same was in motion and at a time and under circumstances when it was dangerous for her to leave the same, and by reason of her reckless and careless conduct received the injuries which she did receive at said time and under said circumstances.

E. F. WARREN,
C. W. SEYMOUR,
B. P. WAGGENER,
Attorneys for Defendant, The Missouri Pacific Railway Co.

Endorsed: Dist. court, Otoe Co., Neb. Received and filed Apr. 6th, 1891. M. S. Campbell, clerk. Gen'l No., 4510.

And afterwards, on the 2d day of June, 1891, there was filed in the office of the clerk a reply in the words and figures following, to wit:

In the District Court of Otoe County, Nebraska.

OSWALD BAIER, Administrator of the Estate of Catherine Baier, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY. } Reply.

Now comes the plaintiff and for reply to the answer of defendant denies each and all of the averments and allegations therein contained and demands judgment as in his petition heretofore prayed.

H. D. TRAVIS &
JOHN C. WATSON,
Attorneys for Plain'f.

STATE OF NEBRASKA, } ss:
Cass County, }

The said plaintiff, Oswald Baier, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled cause; that the facts stated in the foregoing reply are true, as he verily believes.

OSWALD BAIER.

Subscribed in my presence and sworn to before me this 22 30th day of May, A. D. 1891.

L. F. GIBERSON,
Notary Public. [SEAL.]

Endorsed: In the district court, Otoe county, Nebraska. Oswald Baier, adm'r, plaintiff, *vs.* The Missouri Pacific Railway Company, defendant. Reply. Dist. court, Otoe county, Neb. Received and filed Jun- 2d, 1891. M. S. Campbell, clerk. H. D. Travis, att'y.

Instructions Asked by Plaintiff and Given.

GENTLEMEN OF THE JURY: The plaintiff, as administrator of the estate of Katherine Baier, deceased, demands a judgment in this action against the defendant railroad company for loss of support caused by the death of said Katherine Baier, and alleges as his cause of action that said Katherine Baier on the 26th day of December, 1889, lost her life by and on account of the carelessness and negligence of defendant's servants and employees. In substance, the plaintiff charges that on the 6th day of December, 1889, defendant undertook for a valuable consideration to carry Katherine Baier as a passenger from Nehawka, a station on the defendant's line of road, to Lincoln, Nebraska; that at the city of Weeping Water, an intermediate station on defendant's line of road, passengers travelling from Nehawka to Lincoln were compelled to change

cars from one train to another, and that said Katherine Baier, while in the exercise of ordinary care and under the direction and in the charge of defendant's servants and employés, through and on account of their carelessness and by no fault of her own was thrown violently to the ground when getting off of the defendant's cars, so that she was run over by the cars and fatally injured, from which injury she died; the particular circumstances of such injury are fully set forth in plaintiff's petition and have been detailed by the witnesses who have testified in this case.

The answer of the defendant to this petition in substance denies that plaintiff was injured through the fault or negligence of
23 the defendant, its agents and servants, but alleges that plaintiff's injury was the result of her own negligence in attempting to alight from defendant's train of cars when the same were in motion and when cautioned by her fellow-passengers that it was dangerous to attempt to alight from said train while it was in motion and before it was stationary at the depot for passengers to enter and depart therefrom.

No. 1. You are instructed that u pon the issues thus presented by the pleadings the burden of proof is upon the plaintiff to establish by a preponderance of the evidence all of the material allegations of his petition, which are:

Given. Defendant ex.

1. That *defendant* was a regular passenger upon defendant's train of cars at the time of the accident which resulted in her death.

2. That in attempting to alight from the cars at Weeping Water, where the accident occurred, she was following the directions of the defendant's employees, and that the injury complained of was not the result of her own gross negligence, but that it was caused by the carelessness and negligence of the defendant's servants and employees; and,

3. That Katherine Baier died as a result of the injuries received by her while a passenger on the line of defendant's road.

No. 2. In weighing the evidence in this case, if, after a careful examination of it, you find the preponderance of evidence is not with the plaintiff, but that it is evenly balanced or is with the defendant, then and in case you so find you would have to find for the defendant. The weight of evidence or preponderance of testimony does not necessarily depend on the number of witnesses adduced by either side. In weighing the evidence and determining the questions which depend upon the evidence you are at liberty to take into consideration all the facts and circumstances
24 surrounding the case, as shown by the evidence; the interest of the witnesses or any of them, as shown by their testimony, in the result of your verdict; their relationship to the parties in interest, if any be shown by the evidence; their intelligence, their bias, and prejudice, if any such appear from their evidence; their manner of testifying and their opportunities for knowing the truth of the matters of which they testify; the reasonableness or unreason-

Given. Defendant ex.

Given. Def't ex.

ableness of their statements upon the witness stand, the extent to which they are corroborated by other witnesses, and by the circumstances surrounding the transaction for which they testify; their appearance and demeanor while upon the witness stand while before you; the candor and fairness or want of candor and fairness with which they testify, and you are thus to determine for yourselves the weight and credit which should be given to the testimony of the several witnesses.

No. 3. The plaintiff contends that the deceased, Katherine Baier, was instructed by the conductor of the defendant's train upon which she was a passenger to change cars at the passenger depot in Weeping Water, and that in obedience to such instructions the deceased did remain on said car until it halted and stopped at the said depot; that then, while the deceased was in the act of alighting from the car in which she was riding, the train started again, and that deceased fell from the platform of said car and was injured. The defendant contends that after said train had passed the depot or as it was passing the depot the said Katherine Baier got up and left her seat in the car and was out on the steps or platform of *of* the car while it was in motion, and while in that position one or more passengers told her not to jump, that the train would stop, but that, disregarding such warning, she stepped or jumped from the train while in motion and was injured. These contentions present the question of fact which determine plaintiff's right to recover, and—

Given. Defendant ex.

25 You are to take the testimony both for the plaintiff and defendant bearing upon this case, and, after carefully weighing the same as directed by these instructions, you will determine whether the facts as contended by the plaintiff are sustained by a preponderance of the evidence, and if you find they are, then you are directed to return a verdict for the plaintiffs.

If you find the evidence is evenly balanced, or that the preponderance of the evidence is in favor of the defendant, as more fully defined by these instructions, your verdict will be in favor of the defendant.

Given. Defendant ex.

No. 4. As a matter of law you are instructed that the defendant railroad company is bound to carry its passengers without injury, and that said company is liable for damages suffered by passengers through accident while upon its trains which is not contributed to by the gross negligence of the parties injured.

By gross negligence, as used in the foregoing instruction, it is meant such negligence on the part of a passenger as would amount to a disregard of his or her own safety when in the presence of danger and which would amount to wilfull indif-erence to the injury liable to follow or result from such carelessness and negligence.

Defendant specially excepts to the portion of instruction No. 4 which makes the defendant liable to passengers for damage sus-

tained through accident & to each and every other part of said instruction.

Given. Defendant ex.

No. 5. You are instructed that it is the duty of the defendant in running and managing its trains to have at all times the highest regard for the safety of its passengers. So it was their duty at Weeping Water, where they had provided for a change of cars for passengers going in a certain direction, to provide 26 suitable and proper and safe means to make such change, and if their arrangement at said point where this injury occurred was not such as above required, and that by means of the failure of the defendant so to perform such duty that passengers at said point who were obliged to change cars were exposed to unnecessary risk and were likely when using due and ordinary caution to become confused and be subject to injuries, such as the deceased received, and that because of such faulty arrangements the defendants in this action were guilty of the acts of negligence as alleged, and that the deceased, because of such acts, did receive her injury while she was in the exercise of due and ordinary care herself, then in such case the defendant would be liable.

Given. Defendant ex.

No. 6. You are to determine from the evidence whether deceased attempted to leave defendant's train of cars while it was in motion or whether after starting to leave the car the train was put in motion, and whether deceased then persisted in leaving car under such circumstances that a person of ordinary caution and care would have apprehended the danger in so doing, for if the attempt to leave the train was made under such circumstances that a person of ordinary care and caution would not have apprehended danger it would not be such an act of carelessness as would relieve defendant from the responsibility otherwise resting upon it.

Under ordinary circumstances, as a matter of law, it would be gross negligence for a person to leap from a moving train, yet the determination of the fact as to whether it is gross negligence for a passenger to attempt to leave a train while in motion depends upon the particular circumstances surrounding each particular case under consideration, and it is for you to determine in this case, from the evidence and circumstances, whether the act of the deceased in leaving the train at Weeping Water was gross negligence such as would relieve the defendant from liability in this case.

Given. Defendant ex.

No. 7. The jury are instructed that the 27 fact, if you should so find from the evidence, that Katherine Baier believed that it was not the intention to stop the train long enough for her to get off, with a full appreciation of the danger in so doing, stepped or jumped off the train while it was in motion, although warned by passengers not to do so, then the plaintiff cannot recover in this action and your verdict should be for the defendant.

Given. Defendant ex.

No. 8. Should you find from the evidence that the conductor in charge of the defendant's train upon which plaintiff and his deceased

wife were riding instructed Katherine Baier to get on the car from which she had alighted at the water tank in Weeping Water, instructing her that the train would stop at the passenger depot, where she could alight or get off, and that said Katherine Baier, in obedience to the directions of said conductor, got on the car and rode to the passenger depot, and that the train stopped at said depot, and that the said Katherine there attempted to get off at the said train, and while in the act of doing so the train again started, and that deceased was thrown or fell or jumped from said train while it was in motion, and in so doing received the injury which resulted in her death, you will next inquire from the evidence and determine whether she was, in trying to alight from the cars while the train was in motion, guilty of gross negligence.

Given. Defendant ex.

No. 9. Should you find from the evidence that the deceased had a reasonable and sufficient time in which to alight from said train while it was stationary at the depot, and that instead of doing so she waited or delayed her exit from the train until it was in motion, and that she then, while the train was in motion, in attempting to alight therefrom, was injured, then and in case you so find you are instructed that defendant would not be liable in this action.

Given. Defendant ex.

No. 10. Should you, however, find that, in obedience to the direction of the conductor upon the halting at the depot platform, the deceased attempted to alight therefrom, and that she did

28 not have sufficient time to do so on account of the train pulling out while she was in the act of disembarking, and that she was injured under such circumstances, then and in case you so find the defendant would be liable, for the act of the deceased in attempting to alight from the train under such circumstances would not amount to gross negligence within the meaning of the law, as defined by these instructions.

Given. Defendant ex.

Defendant specially excepts to instruction No. 10 and to each and every part thereof.

You are instructed that the issues joined in this case between the plaintiff and defendant are now to be submitted to you for determination from the evidence before you and the instructions as given, the gist of the action being whether or not Katherine Baier's death was the result of negligence on the part of the defendant railroad company, or whether such death resulted because of her own negligence and want of ordinary care and caution, or whether it was the result of an unavoidable accident. This question you will determine upon a careful consideration of the evidence, and if you find in this case for the plaintiff, then it will become your duty to determine the amount of damages that those who are represented by the plaintiff in this action have sustained.

The law furnishes no exact measure by which this question can be determined, but it is left largely to your sound discretion to fix and determine from the evidence before you.

The amount, if you should find in favor of the plaintiff, should

be compensatory in its nature. Nothing is to be allowed by way of vindicative damages, but you are to allow for the pecuniary loss sustained by the children of the deceased by the death of their mother, and you should allow them full compensation for the loss sustained by them occasioned by the death of their mother in being deprived of her care, nurture, and training in the bringing up and rearing of said children and preparing them for the duties of life and the instruction and physical, moral, and intellectual training, as well as the ages of the minor children, so far as these matters have been proven, should be considered by you if you find for the plaintiff.

Given. Defendant ex. The injury, if you find for the plaintiff, should be compensated by the allowance of the amount of damage you believe from the evidence the children of the deceased have suffered. This amount should be the same and no more than she would be entitled to if the same injury had been caused by a private person.

SAM'L M. CHAPMAN, *Judge.*

Endorsed: Dist. court, Otoe Co., Neb. Received and filed Dec. 17th, 1891. M. S. Campbell, clerk.

Instructions Asked by Pl'ff Refused.

Refused. Ex. to by pl'ff. If the jury find for the plaintiff they should assess some damages.

The law which confers the right of action is for the purpose of providing pecuniary compensation for the life which was lost by negligence to the representatives of the deceased person.

There is no fixed measure of the compensation provided, but the jury cannot find more than $5,000. It is proper for the jury to take into consideration the circumstances and the occupation of the deceased in making such an estimate.

The jury are instructed that it is proper, in case you find for the plaintiff, to allow interest on the amount which you shall assess as damages to the plaintiff. The interest can be figured and added to the amount that you shall find for the plaintiff, if you so find; or you can find, if you find from the evidence for the plaintiff, the amount of damages that you believe under the testimony, if any, that the plaintiff is entitled —, and you can then further find the amount of interest, if you should so find for the plaintiff and conclude to allow interest on the amount, making the interest separate from the amount of damages, if any, that shall be allowed.

Instructions Asked by Def't Refused.

In the District Court of Otoe County, Nebraska.

OSWALD BAIER, as Administrator of the Estate of Katherine Baier, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Special instructions asked for by defendant.

Refused. Ex. to by defendant.

1. The jury are instructed that under the pleadings and evidence in this case the plaintiff cannot recover, and they will return a general verdict for the d-fendant.

Refused. Ex. to by defendant.

2. The jury are instructed that in no event can the plaintiff recover in this action more than nominal damages.

3. The jury are instructed that the burden of proof is upon the plaintiff to sustain by a preponderance of evidence each and every material allegation of his said petition.

4. The jury are instructe l that it is alleged in the petition that the deceased, Katherine Baier, died as a result of injuries received by her while a passenger on the line of defendant's road. The burden of proving this allegation is upon the plaintiff, and irrespective of whether the defendant was guilty of negligence or not, unless the jury find from the evidence that the death of Katherine Baier resulted from the injuries by her received, the plaintiff cannot recover.

Refused. Ex. to by defendant.

Refused. Ex. to by defendant.

5. The jury are instructed that the plaintiff cannot recover upon any other or different grounds of negligence than such as are specifically alleged and set forth in the plaintiff's petition.

Refused. Ex. to by defendant.

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6. It is alleged in plaintiff's petition that "it was necessary for the said Katherine Baier to change from one of defendant's train of cars to another, which said trains made close connection at Weeping Water, and that defendant was bound to furnish her suitable means, time, and instruction to make said change; that the defendant nevertheless failed and neglected to do its duty in these matters, and carelessly, negligently, and wrongfully performed its duty toward her in making said change; that the defendant furnished no platform for that purpose; that the ground was three or four feet below the lowest of said car; that the defendant then and there gave her wrong instructions about making said change, and did not give her time to make said change," etc.

The jury are instructed that negligence to be actionable must be the proximate cause of the injury complained of, and before the defendant can be held responsible for any of the said matters and

things so alleged in said petition the jury must find that the same proximately contributed to the injury complained of.

Refused. Ex. to by defendant.

7. It is further alleged in said petition that "said train stopped at defendant's water tank before reaching the depot at Weeping Water, and the conductor of said train then and there wrongfully, carelessly, and negligently instructed the said Katherine Baier to get off said train." The jury are instructed that under the evidence in this case, even though they find as a fact that the conductor of said train did wrongfully and negligently instruct the said Katherine Baier to get off said train at said water tank, yet said fact did not contribute directly or proximately to the injury complained of, and the jury is not authorized to consider such fact as tending to prove negligence on the part of the defendant which caused the injuries complained of.

Refused. Ex. to by defendant.

8. It is further alleged in said petition that "said Katherine Baier did get off at the water tank and the conductor of said train, finding he had made a mistake, immediately instructed her to get on again." The jury are instructed that if they find this allegation of the petition to be true, and that the conductor had wrongfully instructed Katherine Baier to get off at the water tank, the jury are instructed that it was the duty of the conductor then and there to instruct her to get on the train again, and if she was not injured in getting off the train at the water tank and getting onto the same again, then that circumstances must not be considered by the jury as tending to prove any actionable negligence on the part of the defendant.

32

Refused. Ex. to by defendant.

9. The jury are instructed that it is not claimed or alleged in said plaintiff's petition that the said Katherine Baier, by reason of any negligence on the part of those in charge of said train, was placed in a position where she was required to act suddenly and on the impulse of the moment, but it is claimed that the said train stopped, and that while so stopped she attempted to leave the same, and by reason of a sudden jerk thereof she was thrown to the ground and injured, and in no event can the plaintiff recover unless the jury find this allegation to be true.

Refused. Ex. to by defendant.

10. The jury are further instructed that if they should find from the evidence that the said train did stop at the station or near the said station, and that said Katherine Baier attempted to leave the same, and when in the act of stepping from the train it started, then before the plaintiff would be entitled to recover it must appear affirmatively from the evidence that the employees or some of them in charge of said train knew, or by the exercise of reasonable diligence should have known, of the position of danger in which the said Katherine Baier was placed in time, by the exercise of ordinary diligence, to have prevented the injury to her.

Refused. Ex. to by defendant.

11. The jury are instructed that the defendant claims that after said train had passed the depot or as it was passing the depot the said Katherine Baier got up and left her seat in the car and was out on the platform or steps of the car while it was in motion, and that while in that position one or more of the passengers on said train told her, in substance, not to jump, that the train would stop, but, disregarding such notice and warning, and without any notice or knowledge of those in charge of said train, she stepped or jumped from the same while it was in motion and received the injuries complained of, and that, therefore, she was guilty of contributory negligence and was alone responsible for her injuries, and on this the court instructs the jury that if the foregoing statement of the facts is true, then the plaintiff cannot recover in this action, and your verdict should be for the defendant.

Covered by court's ins.

Refused. Ex. to by defendant.

12. If the jury believe that the deceased, Katherine Baier, attempted to get off while the train was in motion, in disregard of a warning not to do so, she was guilty of gross negligence, and the plaintiff cannot recover in this action.

(13 omitted.)

Refused. Ex. to by defendant.

14. The jury are instructed that the belief of Katherine Baier that she would be carried by said station would not justify her in leaving the train and, in the face of warning not to do so, to step or jump off of the same while it was in motion, and if she did so leave the train and received the injuries complained of she was guilty of negligence, and the plaintiff cannot recover in this action, and your verdict should be for the defendant.

Refused. Ex. to by defendant.

15. The court instructs the jury that railroad companies are bound to stop at stations for which they have received passengers a sufficient length of time to enable them, using due diligence, to alight with safety and convenience; but if a train should start before the passenger has had a sufficient opportunity to alight safely, and she was consequently obliged to continue on to the next station, the company would be liable for the expense, loss of time, or other damage which the passenger might sustain, but the fault of the company in omitting to allow sufficient time to alight with safety does not justify the passenger in imprudently exposing herself to danger while getting off the cars while in motion.

34

Refused. Ex. to by defendant.

16. The jury are instructed that if they find from the evidence that Katherine Baier attempted to leave said train voluntarily at a time and place when and where the defendant could not anticipate that she would leave it she then ceased to be a passenger on said defendant's train as soon as she had left it, and the defendant was under no obligation towards her unless it had notice of the dangerous position in which she had voluntarily placed herself.

Refused. Ex. to by defendant.

17. The jury are instructed that so long as the train was in motion Katherine Baier could not leave it and still retain her rights to protection. By leaving the train while in motion she ceased to be a passenger and to have the rights of a passenger as completely, though the train was moving slowly and was near by the station, as if she had left it while moving at full speed between stations.

Refused. Ex. to by defendant.

18. The jury are instructed that the fact that the coach in which Katherine Baier was riding had passed the platform of the station to which she was entitled to be carried did not give her the right to leave the train at the risk of the company while it was in motion.

If she would sustain any injury by being carried beyond the station her remedy would have been by an action based on that injury.

Refused. Ex. to by defendant.

19. The jury are instructed that ordinarily in an action to recover damages for negligence of the defendant where the contributory negli-
35 gence of the deceased is set up as an affirmative defense the burden of proof is upon the defendant to sustain that defense and prove contributory negligence on the part of the person injured, but where the testimony of the plaintiff is of such a character as to justify the jury in finding that the negligence of the deceased contributed to the injury the jury are instructed that the burden of proof is no longer upon the defendant to prove contributory negligence, but is upon the plaintiff to show that the negligence of the deceased did not proximately contribute to the injury complained of, and in such case, unless the plaintiff has so shown to the satisfaction of the jury that the negligence of the deceased did not proximately contribute to the injury complained of, then the plaintiff cannot recover and your verdict should be for the defendant.

Refused. Ex. to by defendant.

20. The jury are instructed that in an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part or on the part of the deceased, contributory negligence is a matter of defense, the burden of proving it being on the defendant, but if you find from the plaintiff's own evidence that the deceased was guilty of contributory negligence, then the burden is not upon the defendant to prove contributory negligence and the plaintiff cannot recover.

Refused. Ex. to by defendant.

21. The jury are instructed that while it is the duty of a railroad company to stop its trains at the station to which it has contracted to carry a passenger and to land him safely and conveniently, yet the fact that the company neglects this duty and its train passes the station without stopping does not justify a passenger in jumping from a moving train.

Refused. Ex. to by defendant.

22. The jury are instructed that where a passenger voluntarily leaves a train of cars while in motion simply to avoid being carried by the station where he desires to stop, and in doing so receives an injury, his own negligence is the proximate cause of the injury and he cannot recover against the com-
36 pany, though the conductor was also at fault in not stopping the train; and in this case, if you find from the evidence that Katherine Baier voluntarily left the train while it was in motion simply to avoid being carried beyond the station of Weeping Water, and in doing so received the injury complained of, her own negligence was the proximate cause of the injury and plaintiff cannot recover against this defendant, though the conductor or engineer or those in charge of the train were at fault in not stopping it at the station.

Refused. Ex. to by defendant.

23. The jury are instructed that if they find from the evidence that Katherine Baier voluntarily attempted to leave the said train while it was in motion, without notice to or knowledge of the employees in charge of said train, and in doing so received the injuries complained of, then the plaintiff cannot recover herein, and your verdict should be for the defendant.

Refused. Ex. to by defendant.

24. The jury are instructed that the boarding of or alighting — a moving train is presumably and generally negligence of itself, and in order to rebut this presumption and justify a recovery for an injury sustained in getting on or off a moving train it must appear that the passenger was by the act of the defendant put to an election between alternate dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created which interfered to some extent with his free agency and was calculated to divert his attention from the danger and create a confidence that the attempt could be made in safety.

Refused. Ex. to by defendant.

25. The jury are instructed that as a matter of law it is negligence for a passenger to leap from a moving train for the mere purpose of getting off at a station where the train should stop, but does not do so, even though he takes that course in order to save others distress on account of his absence; and in this case, if the jury find from the evidence that Mrs. Baier attempted voluntarily to
37 leave the moving train merely for the purpose of avoiding the inconvenience of being carried by the station and in consequence of such act on her part received the injury complained of, the plaintiff cannot recover herein, and your verdict should be for the defendant.

Refused. Ex. to by defendant.

26. The jury are instructed that if they find from the evidence that Mrs. Baier was upon the platform of the defendant's car after the train was in motion and attempted to get off from the same while thus in motion and was injured in consequence of such act on her part,

she was guilty of carelessness, and the plaintiff cannot recover in this action.

Refused. Ex. to by defendant. 27. The jury are instructed that if Mrs. Baier undertook to get off of defendant's cars while they were in motion and after they had passed the platform of the defendant's station, she was guilty of negligence, and plaintiff cannot recover in this action.

Refused. Ex. to by defendant. 28. The jury are instructed that it is the law that if a passenger, by the negligence of the agents and employees of the railroad company in charge of the train, is carried beyond the station where he has the right to be let off, he can recover for the inconvenience, loss of time, labor, and expense of traveling back; but if he leaps from the train while in motion in order to avoid being carried beyond his stopping place, he does so at his own risk and peril; and in this case, if the jury should

Refused. Ex. to by defendant. believe from the evidence that the employees in charge of said train were guilty of negligence in failing to stop said train a sufficient length of time to enable Mrs. Baier to leave the same, and that thereafter, while the train was in motion, she went out on the platform of the cars and was notified by passengers that the train would come to a stop and for her not to jump, and, notwithstanding which notice, she attempted to leave the car by stepping or jumping

38 from the steps of the platform while the car was in motion and received the injuries complained of, and but for which act she would not have been injured, then the plaintiff cannot recover herein, and you will return a general verdict for the defendant.

Refused. Ex. to by defendant. 29. The jury are instructed that when the deceased, Katherine Baier, ascertained that said train did not stop at the station a sufficient length of time to enable her to leave the car it was her right to demand of the officers or employees in charge of the same to stop the train, and if she had been carried by said station beyond her destination she could have recovered compensation for returning and all damages that she might have sustained on account of being so carried by said station, but she had no right to endanger her life or limb by jumping from the cars in order to prevent being carried by said station when she found that the car was in motion, and if it appears that she did so jump and that the injury complained of was the result you will find for the defendant.

Refused. Ex. to by defendant. 30. The jury are instructed that it is the law that one who has passed out of a railway car and got upon the platform thereof and attempted to step or jump from the car while it is in motion cannot recover for injuries suffered in consequence thereof, and though he had reached his place of destination and the train which had previously stopped to permit passengers to alight had not so stopped for a reasonable length of time; and in this case if the jury believe from the evidence that the conductor while at the water station told Mrs.

Baier that the train would stop at the station and she went into the car and took her seat, and, finding that the train did not stop at the station, went out onto the platform and, to avoid the inconvenience of being carried by the station and under the apprehension that the train would not stop, stepped or jumped off the said train while in motion and received the injuries complained of, she was guilty of negligence proximately contributing to the injury, and the plaintiff cannot recover herein, and your verdict should be for the defendant.

Refused. Ex. to by defendant.

31. The jury are instructed that if the deceased got up from her seat in the car or left the inside of the car while the train was in motion and went out onto the platform of the coach, and her presence on the platform of the coach was not known to any agent or employee of the defendant in charge of said train, and she was thrown from the train by a sudden jerk or movement of the car, then she was guilty of contributory negligence, which would prevent a recovery herein for the injuries which she received, and your verdict should be for the defendant.

Refused. Ex. to by defendant.

32. The jury are instructed that if a railroad company carry a passenger beyond a station to which he is ticketed without his consent and without affording him a reasonable opportunity to leave the train he has a right of action for whatever damage he may sustain by reason thereof, but such failure or neglect of the railway company does not justify him to step or leap from the train while in motion to avoid the inconvenience of being carried by; but if he does so and is injured in consequence he must be held to have been the author of his own misfortune.

Refused. Ex. to by defendant.

33. The jury are instructed that the fact that a passenger on a railroad is in danger of being carried past his station will not justify him in getting off while the train is in motion or in imprudently exposing himself to danger, and if he does either and is injured in consequence thereof it is owing to his own want of ordinary care and he cannot recover in a suit against the railroad company.

Refused. Ex. to by defendant.

34. The jury are instructed that if they believe from the evidence in this case that the proximate or immediate cause of the injuries to the deceased, Katherine Baier, was her leaving the train while it was in motion, then the jury are instructed that the plaintiff cannot recover herein, and your verdict should be for the defendant.

Refused. Ex. to by defendant.

35. The jury are instructed that it is a requisite to the liability of a railway company as a passenger-carrier that the passenger should not have been guilty of want of ordinary care and prudence which directly contributed to the injury; and in this case, if the jury believe from the evidence that the deceased, Katherine Baier, by the exercise of reasonable and ordinary care could have avoided the injury complained of and did not exercise such reasonable

and ordinary care, and in consequence thereof was injured, the plaintiff cannot recover herein, and your verdict should be for the defendant.

Refused. Ex. to by defendant. 36. If the jury believe from the evidence that the employees in charge of said train were guilty of negligence in the management thereof, and the deceased, Katherine Baier, by the reasonable and ordinary care could have avoided the consequences of such neglect on the part of such agents and employees and did not and was injured, then the plaintiff cannot recover herein, and your verdict should be for the defendant.

Refused. Ex. to by defendant. 37. The jury are instructed that if they believe from the evidence that the proximate cause of the injury to Katherine Baier was her going out on the platform of said car and attempting to leave the same while in motion, and but for which act she would not have been injured, then she was guilty of negligence, and the plaintiff cannot recover herein, and your verdict must be for the defendant.

Refused. Ex. to by defendant. 38. The jury are instructed that if Mrs. Katherine Baier attempted to get off said train while in motion of her own volition, without being ordered off, without being commanded to get off by an employ- of the company, and was left free to exercise her own volition and remain there and get off when she pleased, she could not 41 recover any damage for the injuries by her sustained in exercising such volition, and if she was injured under such circumstances, then the plaintiff cannot recover herein, and your verdict should be for the defendant.

Refused. Ex. to by defendant. 39. If the jury believe from the evidence that Katherine Baier undertook to get off the train after it began to move, she was guilty of contributory negligence, and plaintiff cannot recover herein.

Refused. Ex. to by defendant. 40. If the jury believe from the evidence that Katherine Baier attempted to get off after the train was in motion in disregard of the warning of passengers not to do, she was guilty of negligence, and plaintiff cannot recover herein.

Refused. Ex. to by defendant. 41. The jury are instructed that for the purposes of this case it is immaterial which acts of negligence, if any, the defendant was guilty of prior to the time when Katherine Baier started out of the train for the purpose of leaving the same. If she left the train while it was in motion, without the knowledge or consent of any employee in charge thereof, and received injury in consequence, and but for which act she would not have been injured, then the plaintiff cannot recover herein.

Refused. Ex. to by defendant. 42. The jury are instructed that it may or may not have been negligence under the circumstances for the defendant not to have stopped its train at said station before the coach in which Kath-

erine Baier was riding had passed the platform, but irrespective of this fact, if she attempted to leave the train while it was in motion and after she was warned not to do so and received the injuries complained of, and but for which act of her own she would not have been injured, then the plaintiff cannot recover herein, and your verdict should be for the defendant.

Refused. Ex. to by defendant.

43. The jury are instructed that for the purposes of this case and of determining whether or not the defendant was guilty of negligence which contributed to the injury complained of they will consider only such acts of omission and commission of the defendant after said train left the water tank, where it had stopped to take on water, and the failure of the defendant to stop the said train at the said depot station in time for the deceased, Katherine Baier, to get off would not of itself be an act of negligence if it was the intention of the defendant to run said train up to a certain point and then back it down to said station, and, irrespective of whether the failure to stop said train at said station was an act of negligence or not, if Katherine Baier thereafter, knowing that the train had not been stopped and while it was in motion, attempted to leave the same and in such attempt received the injury complained of, then the plaintiff cannot recover, and your verdict should be for the defendant.

42

Refused. Ex. to by defendant.

44. The jury are instructed that if Katherine Baier, induced by groundless fear, leaped from the car when there was no reasonable cause to apprehend danger to life or limb by remaining on the train, then, even though the defendant company was guilty of negligence in not stopping said train at the depot, such negligence in not stopping said train at the depot *such negligence* did not proximately cause the death to Katherine Baier and no recovery can be had herein.

Refused. Ex. to by defendant.

45. The jury are instructed that it appears from the evidence that the defen*ad*nt had undertaken to carry the said Katherine Baier from Nehawka to Lincoln, Nebraska, and if at an intermediate station she attempted to leave the cars while in motion, of her own volition, without any express directions by those in charge thereof, and when there was no apparent danger to her remaining on the cars, and she was injured in such attempt, the plaintiff cannot recover, and your verdict should be for the defendant.

Refused. Ex. to by defendant.

46. The jury are instructed that under the evidence the defendant had contracted and undertaken to carry Katherine Baier from Nehawka to Lincoln, Nebraska, and in carrying out said contract was under no obligation to stop its train at Weeping Water or any other intermediate station, and if said Katherine Baier, without the knowledge of those in charge of the train, attempted to leave it while in motion and received the injury complained of, the plaintiff cannot recover, and your verdict should be for the defendant.

43

Refused. Ex. to by defendant.

47. The jury are instructed that when Katherine Baier got into the cars at Nehawka to be carried by the defendant to Lincoln, Nebraska, it was her duty to remain therein until she reached her destination, and if she was injured in attempting to leave the cars while in motion at an intermediate station and those in charge of the train did not know of such attempt, the plaintiff cannot recover herein, and your verdict should be for the defendant.

Refused. Ex. to by defendant.

48. The jury are instructed that under the evidence in this case the defendant was under no obligation, as to Katherine Baier, to stop its train for any length of time at said station of Weeping Water.

Refused. Ex. to by defendant.

49. The jury are instructed that if they find from the evidence that at the time Katherine Baier attempted to leave said train it was in motion and there was no necessity for her to do so, and that there was at the time no apparent danger that she would be injured by remaining in the cars, and she voluntarily placed herself in a position of danger and was injured in consequence, then such injury was her own fault and plaintiff cannot recover herein.

Special Questions Asked by Defendant and Refused.

If the jury find a verdict for the plaintiff they will answer the following special questions, but if they return a general verdict for the defendant the same need not be answered:

1. Did said Katherine Baier attempt to leave said train while in motion?

Answer.

2. Was she warned by some passengers not to do so?

Answer.

44 3. How fast was said train moving when said Katherine Baier attempted to leave the same?

Answer.

4. Was it then dangerous and unsafe for her to leave the train while in motion?

Answer.

5. Did she there leave the train for fear of being carried to Omaha?

Answer

6. If she had remained on said train until it came to a stop, would she have been injured?

Answer.

7. Was there any necessity for her to leave the train at the time she did leave it?

Answer.

8. If question 7 is answered "yes," then state what the necessity was for her leaving the train.

Answer.

9. Did any employee of defendant in charge of said train have any notice that she was attempting to leave said train while in motion?

Answer.

10. If question 9 is answered "yes," give the name of the employee who had such notice.

Answer.

11. Did Katherine Baier of her own will voluntarily attempt to leave said train while in motion?

Answer.

12. If she had not made such attempt, would she have been injured?

Answer.

13. Was the injury to Katherine Baier the result of an accident?

Answer.

14. While Katherine Baier was standing on the steps of
45 the coach as the train was moving did a passenger see her and tell her not to jump; that the train would stop?

Answer.

15. Did she then immediately jump from said train while it was in motion with her back to the engine and receive the injury complained of?

Answer.

16. If she obeyed the warning of the passenger and remained on the train until it stopped, would she have been injured?

Answer.

17. If Katherine Baier had remained in said car until the train came to a stop, would she have received any injury?

Answer.

18. Did she leave the inside of the coach and go out on the platform while the train was in motion?

Answer.

19. When the said Katherine Baier got onto the train at the water tank, did the conductor then tell her to remain in the coach until the train stopped?

Answer.

20. When she stepped or jumped from said train was she looking to the rear of said train with her back to the engine, and did she swing onto the hand rail and — by such means dragged under the car?

Answer.

21. When said Katherine Baier stepped or jumped from said train, did she have a package of apples in her hand and a heavy shawl over her shoulders?

Answer.

22. Did said train stop at the depot for the purpose of uncoupling the Lincoln and Omaha coaches?

Answer.

46 23. If question 22 is answered "yes," state how long it stopped.

Answer.

24. If question 22 is answered "yes," state if Katherine Baier was in the coach or on the platform of the coach when it stopped.

Answer.

25. How near to the door of the depot was the west end of the Lincoln coach when it was uncoupled?

Answer.

26. What was the length of said coaches?

Answer.

27. What was the distance from the door of the station to the place where Katherine Baier jumped from said train?

Answer.

28. If said train did stop at said depot how many feet had it moved from the place where it stopped before Katherine Baier attempted to jump from it?

Answer.

29. If the jury find a general verdict for the plaintiff, what amount is allowed for the grief and suffering of the children over the loss of their mother?

Answer.

30. If the jury find a general verdict for the plaintiff, how much of same is allowed for the damage of the husband by reason of loss of service of Katherine Baier?

Answer.

31. If the jury find a general verdict for the plaintiff, what amount is allowed per week for the loss of services of Katherine Baier as the wife of the said plaintiff?

Ans.

32. If question 31 is answered by fixing an amount per
47 week lost by reason of the death of Katherine Baier, how many weeks are included in such computation?

Ans.

33. If the jury find that defendant was guilty of any negligence which caused or contributed to the injury, state fully and — detail in what such negligence consisted.

Ans.

These special findings, 33 in number, are all refused by the court; to which defendant duly excepts.

SAM'L M. CHAPMAN, *Judge.*

Dist. court, Otoe Co., Neb. Received and filed Dec. 17th, 1891. M. S. Campbell, clerk.

Be it remembered that at a regular term of the district court of the second judicial district of the State of Nebraska, sitting within and for the county of Otoe, begun and held at the court-house, in Nebraska City, said county and State, on Monday, the 7th day of December, 1891—present, Hon. Sam'l M. Chapman, sole presiding judge; John V. Morgan, county attorney; W. H. Wheeler, official reporter; John M. Willman, sheriff; M. S. Campbell, clerk—the following, among other, proceedings were had and done, to wit:

OSWALD BAIER, as Administrator of the Estate of Katherine Baier, Deceased,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY. } Gen'l No., 4510.

48 Now, on this 17th day of December, 1891, this cause came on for trial on the petition, answer, and reply, and thereupon came a jury, to wit, William Metzger, John Smitz, Phineas T. Gray, J. A. Buchanan, Owen Gaffney, W. H. Banning, Harvey Markley, T-os. A. Gilmore, Thos. Nash, Louis Gansell, J. A. Jeffries, and William Brower, twelve good and lawful men of Otoe county, Nebraska, who are duly empanelled and sworn, and the trial proceeds before the court and the said jury, and now the jury, having heard all the evidence adduced by the parties hereto, listened to the arguments of counsel for the respective parties, and having received their charge in writing from the court, now retire to the jury-room to consider of their verdict with instructions from the court that they may bring in a sealed verdict at the opening of court tomorrow morning.

Verdict.

December Term, A. D. 1891, to wit, December 17th, 1891.

THE STATE OF NEBRASKA, } *ss:*
Otoe County, }

OSWALD BAIER, Administrator, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. }

We, the jury in this case, being duly impaneled and sworn, do find and say that plaintiff is entitled to recover damages from the defendant in the sum of $5,000.00.

THOS. A. GILMAN, *Foreman.*

49 The following further proceedings were had and done on the 18th day of December, 1891, that being still a day of said Dec. term, the Hon. Sam'l M. Chapman still presiding:

OSWALD BAIER, Administrator of the Estate of Katherine Baier, Deceased,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY. } Gen'l No., 4510

Now, on this 18th day of December, 1891, comes the jury heretofore impaneled and sworn herein and return their verdict in writing (leaving off the caption), to wit:

December term, 1891, to wit, December 18th, 1891—We, the jury in this case, being duly impaneled and sworn, do find and say that the plaintiff is entitled to recover damages from the defendant in the sum of five thousand dollars, $5,000.00.

THOS. A. GILMORE, *Foreman.*

And now, on the same day, this cause came on for further hearing on motion of defendants to set aside the verdict of the jury and grant a new trial of the issues herein, which motion is submitted to the court without argument and by the court taken under advisement.

Motion for New Trial.

In the District Court of Otoe County, Nebraska.

OSWALD BAIER, as Administrator of the Estate of Katherine Baier, Deceased, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

50 Motion for new trial.

Now comes the said defendant and moves the court to set aside the verdict of the jury and grant a new trial herein for the following reasons, to wit:

1st. Because the verdict of the jury is not sustained by sufficient evidence and is against the weight of evidence.

2nd. Because the verdict of the jury is contrary to law.

3rd. Because the damages allowed are excessive and appear to have been given under the influence of passion and prejudice.

4. Misconduct of the jury, by which the defendant was prevented from having a fair and impartial trial.

5th. Error of law occurring at the trial and duly excepted to by defendant at the time.

6th. Because the court erred in permitting the plaintiff to prove the statements and declarations of Katherine Baier as to the cause of the injury and circumstances connected therewith over the objections and subject to the exceptions of the defendant.

7th. Because the court admitted incompetent, irrelevant, and immaterial evidence over the objections of the defendant.

8th. Because the court erred in permitting the plaintiff, Oswald Baier, to testify as to his wife's services per week as an item of damage in this case.

9th. Abuse of discretion of the court, whereby the defendant was prevented from having a fair and impartial trial.

10th. Error of the court in refusing to permit the defendant to submit to the jury any particular questions of fact for them to answer.

11th. Because the court erred in giving to the jury improper and prejudicial instructions.

51 12th. Because the court erred in refusing to give to the jury instructions numbers 1 to 49, inclusive, asked for by the defendant.

13th. Because the court erred in its general charge to the jury, each and every part of which was duly excepted to by the defendant at the time.

14th. Because the court erred in refusing to instruct the jury as

to the relative rights and obligations of the defendant railway company, as prayed for by the defendant.

15th. Because the court erred in submitting to the jury the form of special verdict prepared by the plaintiff over the objections of the defendant.

16th. Because the court erred in refusing to instruct the jury to return a general verdict for the defendant, as prayed for by the defendant.

17th. Because the court erred in refusing to receive competent, relevant, and material evidence offered by the defendant.

18th. Because the said verdict should have been for the defendant instead of for the plaintiff.

19th. Error of the court in giving instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, & 10 prayed for by defendant.

Affidavits — oral and record evidence will be used on the hearing of this motion.

F. P. Ireland, C. W. Seymour, & B. P. Waggener, attorneys for defendant.

20. Error of the court in refusing to give special instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27. 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 47, 48, 49.

Endorsed: Oswald Baier, adm'r, *vs.* The Mo. Pac. R'y Co. Motion for a new trial. F. P. Ireland, C. W. Seymour, B. P. Waggener, att'ys for def't. Dist. court, Otoe Co., Neb. Received and filed Dec. 17th, 1891. M. S. Campbell, clerk.

52 And on the 11th day of May, 1891, there was filed in the office of the clerk of the district court of Otoe county, Nebraska, a certain stipulation in the words and figures following, to wit:

In the District Court of Otoe County, Nebraska.

ASWELD BAIER, Administrator of the Estate of Catherine Baier, Deceased, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.
} Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that either party to this action may read in evidence on the trial of this case, subject to all objections for irrelevancy and incompetency, the evidence of any witness duly certified to by the official stenographer; which evidence was given on the trial of the case of Oswald Baier, administrator, &c., plaintiff, against The Missouri Pacific Railway Company, in the district court of Cass county, Nebraska, the said evidence to be read the same as the depositions of

the witnesses might be read if duly taken and subscribed in the above-entitled case.

H. D. TRAVIS,
Attorneys for Plaintiff.
B. P. WAGGENER,
Attorneys for Defendant.

(Endorsed:) 5271. M. P. R'y Co. *v.* Oswald Baier, adm'r. Transcript. Supreme court of Nebraska. Filed Mar. 11, 1892.
53 D. A. Campbell, clerk. 5271. Dist. court Otoe Co., Neb. Received and filed May 11th, 1891. M. S. Campbell, clerk.

The following further proceedings were had and done on the 19th day of Dec., that being still a day of said Dec. term of this court, the same officers presiding:

OSWALD BAIER, as Administrator of the Estate of Katherine Baier, Deceased, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.
} Gen'l No., 4510.

Now, on this 19th day of December, 1891, this cause came on for ruling of the court on the motion for a new trial submitted by the defendant herein.

And the court, being now well advised in the premises, doth overrule said motion; to which the defendant duly excepted.

And it is therefore ordered and adjudged by the court that the plaintiff have and recover of the defendant, The Missouri Pacific Railway Company, the sum of five thousand dollars ($5,000.00), together with the costs of this action, taxed at $——, and execution is awarded; to all of which the defendant excepts, and 40 days from the rising of the court is hereby given defendant to prepare bill of exceptions.

Dec. 23d, 1891.—Execution stayed for 40 days from this date, supersedeas bond having been approved and filed pending preparation of bill of exceptions; to all of which plaintiff excepts.

CHAS. L. HALL, *Judge.*

Supersedeas Bond.

Whereas, on the 23d day of December, A. D. 1891, the Missouri Pacific Railroad Company has filed in the supreme court of the State of Nebraska their transcript and petition in error to obtain the reversal of a judgment rendered in the district court of
54 Otoe county, State of Nebraska, on the 19th day of December, A. D. 1891, in favor of Oswald Baier and against the Missouri Pacific Railroad Company, for the sum of five thousand dollars and for costs of suit in an action pending therein, wherein said Oswald Baier was plaintiff and The Missouri Pacific Railroad Company defendant:

Now, therefore, we, The Missouri Pacific Railroad Campany, as principal, and Paul Schminke, C. Chapman, Henry Thiele, M. Baumgarten, C. H. Kressen, F. L. Faunce, as sureties, do hereby undertake to said Oswald Baier in the sum of ten thousand dollars that the said Missouri Pacific Railroad Company will pay the condemnation money and costs in case said judgment shall be affirmed in whole or in part.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By B. P. WAGGENER, *Gen'l Att'y.*
PAUL SCHMINKE.
C. CHAPMAN.
HENRY THIELE.
M. BAUMGARTEN.
C. H. KRESSEN.
F. L. FAUNCE.

I hereby approve of the execution of the above undertaking and the sufficiency of the sureties thereon this 23d day of December, A. D. 1891.

M. S. CAMPBELL,
Clerk of the District Court. [SEAL.]

Endorsed: Oswald Baier, plaintiff, against The Missouri Pacific Railroad Company. Supersedeas bond. B. P. Waggener, F. P. Ireland, C. W. Seymour, attorneys for defendant. Dist. court, Otoe Co., Neb. Received and filed Dec. 23d, 1891. M. S. Campbell, clerk. Gen'l No., 4510.

55 STATE OF NEBRASKA, } ss:
County of Otoe, }

I, M. S. Campbell, clerk of the district court within and for the county of Otoe, do hereby certify the foregoing to be perfect and true copies of the petition of the plaintiff, the answer of the defendant, the plaintiff's reply thereto, all the instructions given — refused, the verdict of the jury, all the journal entries, and the supersedeas bond in the above-entitled cause, as appear on file and of record in my office, being gen'l No. 4510, & the original bill of exceptions, as allowed, signed, and filed, is hereto attached.

In witness whereof I have hereunto set my hand and [SEAL.] the seal of said court, at Nebraska City, said county and State, this 24th day of December, 1891.

M. S. CAMPBELL, *Clerk.*

And on the same day, to wit, the 11th day of March, 1893, there was filed in the office of the clerk of said court a certain bill of exceptions in words and figures following, to wit:

56 To J. C. Watson *et al.*, attorneys for Oswald Baier *et al.*:

You are hereby notified that on the 21st day of January, 1892, at 11 o'clock a. m. of said day, or as soon thereafter as I can be

heard, I will present the draft of the bill of exceptions submitted to you, and your proposed amendments to the same, in the case of Oswald Baier *et al.*, plaintiff-, against The Missouri Pacific R. R. Co., defendant, tried at the December term of the district court in and for Otoe county, State of Nebraska, 1891, to S. M. Chapman, judge of said court, at Nebraska City, at the court-rooms, in the court-house, in said city, Otoe county, State of Nebraska, to settle, allow, and sign said bill of exceptions.

Dated Nebraska City, January 21st, A. D. 1892.

THE MISSOURI PACIFIC R. R. CO.,
By their attorneys, B. P. WAGGENER.
F. P. IRELAND.
C. W. SEYMOUR.

I hereby accept service of the above notice on this 21st day of January, A. D. 1892.

JOHN C. WATSON,
Attorney for the Plaintiff-, Oswald Baier et al., Plaintiff-.

57 In the District Court, Otoe County, Second Judicial District, Nebraska.

OSWALD BAIER, Adm'st'r,
vs.
THE M. P. R. R. COMPANY. } Defendant's Bill of Exceptions.

Appearances: Jno. C. Watson, H. D. Travis, E. H. Wooley, for plaintiff; C. W. Seymour, B. P. Waggener, F. P. Ireland, for defendant.

Be it remembered that at the December term of the Otoe county, Nebraska, district court, to wit, on December the 16th, 1891, that being one of the days of said term of the hearing of the cause of Oswald Baier, administrator, *vs.* The Missouri Pacific Railway Co., in the district court of *of* Otoe county, second judicial district of Nebraska, the above-named plaintiff and the above-named defendant, each, to maintain the issues *of* their respective parts, adduced testimony, and all of the said testimony, the objections thereto, with the ground therefor, with all of the rulings of the court on such objections, and all of the exceptions to the said rulings made and taken at the time, having been by the same defendant reduced to writing within the time therefor allowed by the court in this his bill of exceptions, and the same having been served on the attorney for the plaintiff for examination and amendment, the said defendant now prays the honorable judge before whom the said cause was heard that this *their* bill of exceptions may be settled, allowed, signed, sealed, and made a part of the record in the aforesaid cause in the aforesaid court.

58 *Letters of Administration.*

IN THE STATE OF NEBRASKA, } ss:
Cass County, }

To Oswald Baier:

Whereas Katherine Baier, late of said county, departed this life intestate, being at the time of her death an inhabitant of Cass county, by reason whereof the granting of administration of *his* estate doth devolve upon the county court of Cass county:

You are therefore appointed administrator of said estate, with full authority to collect, demand, and recover all the goods and chattels, rights, credits, and effects of the said Katherine Baier, deceased, wherever the same may be found in this State. Within three months from this date you will make and return to this court a true inventory under oath of the real estate and all the goods and chattels, rights and credits, of the deceased which shall come into your possession or knowledge; and you will pay the debts allowed against the estate, or such dividends thereon as shall be ordered by the county court, and render a just and correct account of your administration within one year from this date, and do and perform all acts required of you by law.

In testimony whereof I have hereunto set my hand and affixed my official seal this fifth day of January, A. D. 1891.

[SEAL.] B. S. RAMSEY,
County Judge.

THE STATE OF NEBRASKA, } ss:
Cass County, }

I, Oswald Baier, do solemnly swear that I will well and truly administer all and singular the goods and chattels, rights and credits and effects, of Katherine Baier, deceased, and pay all just claims and charges against her estate, so far as her assets shall extend, and that I will perform all other acts now or hereafter
59 required by law to the best of — knowledge and ability.

OSWALD BAIER.

Subscribed and sworn to before me this 5th day of January, A. D. 1891.

[SEAL.] B. S. RAMSEY,
County Judge.

STATE OF NEBRASKA, } ss:
County of Cass. }

I, B. S. Ramsey, county judge in and for said county, do hereby certify that the within and foregoing is a true and correct copy of the letters of administration granted to Oswald Baier, administrator of the estate of Katherine Baier, deceased, as appears from the orignal on file in this office.

Witness my — and official seal this 14th day of December, A. D. 1891.

[SEAL.] B. S. RAMSEY,
County Judge.

(Endorsed:) Ex. "A." Letters of administration to Oswald Baier, administrator of estate of Katherine Baier, dec'd. Filed 5th day of January, A. D. 1891. B. S. Ramsey, county judge. Recorded, Probate Record D, page 77.

60 OSWALD BAIER, being produced and duly sworn, testifies as follows:

(Examined by TRAVIS:)

Q. State where you reside.
A. Nehawka, Nebraska.
Q. State where you were residing in December, 1889.
A. In the same place, Nehawka.
Q. State whether or not you are plaintiff in this case.
A. Yes, sir.

Letters of administration offered in evidence (a copy).

Objected to because the original letters are the best evidence, no proper foundation laid for secondary evidence, and as immaterial, incompetent, and *immaterial.*

Overruled. Exception.

Marked Exhibit "A."

Q. State if you remember the accident that occurred at Weeping Water, in which your wife was injured.
A. Yes, sir.
Q. State when that was.
A. December 27th.
Q. What year?
A. 1889.
Q. What time of the day was it?
A. Morning, between four and five o'clock.
Q. State now where you were going and who was with you?
A. I was going to Lincoln with my wife, and three of my little children were with me.
Q. State whether you had tickets or not and what you paid for them.
A. Yes, sir; they were $1.65 per ticket.
Q. How many tickets did you have?
61 A. Two, I think.
Q. Did your wife have a ticket?
A. Yes, sir.
Q. State who came to the depot with you that morning.
A. My two eldest daughters helped us with the children.
—. How many of your children were with you?
A. Three of the smallest ones.
Q. Give the ages of each.

A. One between 2 and 3; one 5 and one 7.
Q. What did you pay for these tickets?
A. $1.65 apiece.
Q. Were they round-trips?
A. Yes, sir.
Q. What is your full name?
A. Oswald Baier.
Q. What was your wife's name?
A. Catherine.
Q. How old was she at the time of the accident?
A. Going on 42.
Q. Where were you going that morning; what was your object?
A. Going to visit her brother, living in Hamilton county.
Q. You may state what car you were put into.

A. Objected to as assuming he was put into a car, and as incompetent, irrelevant, and immaterial.
Sustained. Exception.

Q. State which car you entered.
A. We tried to enter the chair car, but were ordered to go into the smoking car.
Q. Who ordered you to go in there?
A. The conductor.
Q. Are you sure it was the conductor?
62 A. It was the conductor or brakeman; he had a lantern in his hand and stood on the steps of the car.
Q. State what, if any, information you received about changing cars at Weeping Water.
A. As he took our tickets he says, "You folks have to change cars at Weeping Water."
Q. As he took your tickets?
A. The conductor, he came around after we were seated and says, "You folks have to change cars at Weeping Water."
Q. State whether you did change cars at Weeping Water. State just the facts.
A. Before the train stopped the brakeman hollered, "Weeping Water! Change cars for Lincoln!" and not very long after that the conductor stepped in the door. I was sitting right close to the door, and he stepped up to me and says, "You folks have to change cars."
Q. They had stopped where?
A. Water tank.
Q. That was where they stopped to get water?
A. Yes, sir.
Q. State what you did.
A. We all got off there.
Q. You all did?
A. Yes, sir.
Q. State whether or not you knew that was the water tank.
A. I didn't know before I got off. I saw it afterwards.
Q. Then what did the conductor do?

A. I asked him then where the train stood to go to Lincoln, and he said it went out there and I better get back on the train and ride down to the depot. He turned around to my wife and said, You better get on. As she was on the second step the train pulled
63 out and I couldn't get on with the three children. He says to my wife, When the train stops again at the depot then you get off.

Q. To whom did he say that?

A. My wife.

Q. When?

A. Just as she was stepping on the car.

Q. What did you do?

A. Took the children and walked down to the depot.

Q. Go on.

A. The conductor was walking right ahead of me as unconcerned as though nothing was going on. As I got to the depot door I heard a scream. I stopped a little, and then I heard another, and then I knew the voice was my wife's. Then, of course, I run as fast as I could.

Q. Did you walk straight up to the depot without a stop?

A. Yes, sir.

Q. Didn't spend any time by the way?

A. No, sir.

Q. Just as you got to the depot door you heard a scream?

A. Yes, sir.

Q. Do you know how many cars were in that train?

A. No, sir.

Q. Can you give the ages of your children, all of them, at that time?

A. At that time one was between two and three, one was four, and one was seven.

Q. Give their names.

Q. Willie, between two and three; Minnie, about five; John-ie, seven; Emma, ten.

Q. How old was Katie?

A. She was twelve, going on thirteen, at that time.

Q. How old was Mary?

64 A. About fifteen—past, I think.

Q. Etta?

A. About seventeen.

Q. Are these children all living now?

A. Yes, sir.

Q. State what was done with your wife after she was hurt.

A. After I got there I found her lying on the platform; they had pulled her off a little from the walk where she got hurt. I tried to help her, but they told me to let her alone.

Q. Was she carried away?

A. Yes, sir.

Q. State what injury she had received.

A. Both of her legs were cut off and just hanging by a little skin.

Q. How long did she live after that?

A. Just a week; died the 3rd of January.
Q. State, if you know, what was the cause of her death.
A. That was caused by getting hurt.
Q. State the time again when she died.
A. The 3rd of January, 1890.
Q. The January following the December she was hurt?
A. Yes, sir.
Q. How long did you say she lived after she was hurt?
A. Just one week.
Q. After she was carried into the depot what was done with her, if anything?
A. Nothing was done; she laid about two hours, when they gave her some whiskey.
Q. Did they have some physician?
A. Yes, sir; one Dr. Hall, from Weeping Water.
Q. How long after she was carried into the depot before he came?
A. I should judge it was about a quarter of an hour;
65 something like that.
Q. I will ask you what condition of health your wife was in when she was killed.
A. Good, strong, healthy woman.
Q. State whether or not she did the household work for the family.
A. Yes, sir; the children worked out and she did all the work herself.
Q. State what was the nature of the work she did.
A. We had seven children and she done all the washing for them.
Q. State whether or not you kept any hired help.
A. No, sir.
Q. She did all the work?
A. Yes, sir.

(WATSON:)

Q. You are administrator of the estate?

Objected to, as the original record is the best evidence.
Overruled. Exception.

Q. You have qualified?
A. Yes, sir; I have qualified and given bond as administrator.

Moved to strike out answer of the witness as not the best evidence and as incompetent, irrelevant, and immaterial.
Overruled. Exception.

Cross-examination.

(Examined by WAGGONER:)

Q. What time in the morning was it that you went to the depot?
A. Little before 4 o'clock.
Q. What kind of a morning was it as to weather?
66 A. Kind of a cold, frosty morning.

Q. Any clouds in the sky?
A. Yes, sir.
Q. A good deal of frost in the atmosphere?
A. I noticed the planks were frosty.
Q. Who got on the train first, you or your wife?
A. My wife got on first.
Q. Then the children?
A. Yes, sir; then the children.
Q. Then yourself?
A. Yes, sir.
Q. That was on the front end of the chair car?
A. Yes, sir.
Q. The brakeman and conductor were on the other end of the chair car?
A. Yes, sir.
Q. On the same car you stepped upon the platform?
A. Yes, sir.
Q. Before you stepped onto the platform neither the brakeman or conductor had said anything to you, had they?
A. When my folks went on they went on first on the side of the chair; there are steps on the side of the chair car; there is where we tried to get on. They hollered back from the car in front.
Q. At that time were you on the platform or steps of the car?
A. On the platform.
Q. Didn't you testify on the former trial that you were on the steps of the car?
A. I don't think I did.
Q. At that time the conductor and brakeman were on the steps of the other end of the car?
A. Yes, sir.
Q. How long is that car?
67 A. I could not tell you.
Q. Fifty or sixty feet?
A. Looks to me that way.
Q. They hollered from the other end of the car for you to take *for you to take* the other car?
A. Yes, sir.
Q. Quite dark at that time?
A. Yes, sir; it was cloudy.
Q. Was there any light at the place you got on?
A. No, sir.
Q. They had a lantern?
A. Yes, sir.
Q. They were standing on the steps of the car when he hollered to you and told you to take the other car?
A. Yes, sir.
Q. Did they know you were trying to get into the chair car?
A. I don't know; they hollered to us.
Q. Could they see you were trying to get into the chair car?
A. I believe they could.
Q. How could they see through the car?

A. They could see around that car—around the side.
Q. They were on the other end?
A. Yes, sir.
Q. Your wife and children were on the other end, on the platform?
A. Yes, sir.
Q. They could see your wife and children trying to get into the chair car?
A. Yes, sir.
Q. They told you to take the smoker?
A. Yes, sir.
Q. Did they say smoker?
A. No, sir; says, Take the other car.
68 Q. Did they say in front of it?
A. Yes, sir.
Q. Say, Take the front car?
A. Yes, sir.
Q. They were talking to you?
A. Yes, sir.
Q. How many people were on the platform at that time?
A. Nobody.
Q. They stepped on the platform?
A. Lower end of the steps.
Q. Did they have lanterns in their hands?
A. Yes, sir.
Q. Did you try to get into the chair car?
A. Yes, sir; that was my intention.
Q. Did you try to open the door of the chair car?
A. No, sir.
Q. Were you on the platform of the chair car at all?
A. Yes, sir.
Q. Your wife and children?
A. Yes, sir; we were all of the platform of the chair car.
Q. You have lived at Nehawka how long?
A. About two years.
Q. Where did you live before that?
A. Four miles north of Nehawka.
Q. How long did you live there?
A. About eight years, I think.
Q. You have travelled some considerably on the cars?
A. Yes, sir.
Q. Your wife had travelled on the cars?
A. Not very much, but she has traveled before.
69 Q. About how many times during the two years before her death did she travel on the cars?
A. I don't recollect.
Q. Where had she been?
A. Yes, sir; she went to Omaha once.
Q. You go to Weeping Water frequently?
A. Not very often.
Q. How many times during the year previous to that date?

A. I don't know as I ever was; don't recollect; I went to Omaha about three times.

Q. You know where the water tank was at Weeping Water?

A. Yes, sir; I know where it was.

Q. On the east of the depot or south?

A. East.

Q. How far east?

A. I should think about 120 feet; somewheres along there.

Q. When you went into the smoking car you discovered it was the smoking car?

A. Yes, sir.

Q. Were you smoking?

A. No, sir.

Q. Did you smoke on the way up?

A. Yes, sir.

Q. Did you meet any person on the train that you knew?

A. No, sir.

Q. Did you have any conversation with any one?

A. Just a little bit with a man there.

Q. Mr. Reckinger?

A. He asked where I was going and etc.

Q. How near to you did he sit?

A. On the right-hand side.

Q. Right opposite you?

70 A. Yes, sir; a little ahead of me.

Q. You and your wife were occupying the same seat?

A. No, sir.

Q. How?

A. I was in the first seat and she was in front of me.

Q. When the conductor came in which was did he come from?

A. From the other car.

Q. He didn't come from the baggage car?

A. No, sir.

Q. And took up your tickets?

A. Yes, sir.

Q. Your tickets were for Lincoln?

A. Yes, sir.

Q. You had no tickets to Weeping Water?

A. No, sir.

Q. It was a through ticket from Nehawka to Lincoln and return?

A. Yes, sir.

Q. He told you to change cars at Weeping Water?

A. Yes, sir.

Q. That was all he said?

A. When he took the tickets he says, You folks have to change cars at Weeping Water.

Q. That was all?

A. Yes, sir.

Q. You knew that before?

A. Yes, sir; I knew we had to change cars.

Q. Who told you that?
A. Several parties.
Q. Had you enquired about it before?
A. I don't remember as I have, but I knew it.
Q. Your wife knew it?
A. Yes, sir; I told her.
71 Q. She knew it?
A. Yes, sir.
Q. The next thing you noticed was stopping at the water tank?
A. I didn't know where it was, but they made a stop there.
Q. Did they stop any time between Nehawka and the water tank?
A. No, sir.
Q. The next stop was at the water station?
A. Yes, sir.
Q. You say the conductor then opened the door and said that was the place for you to get off?
A. Yes, sir.
Q. You are positive it was the conductor?
A. Yes, sir.
Q. Had you ever seen him before?
A. No, sir; but he wore a conductor's coat and had a lantern.
Q. Which door did he open?
A. Back of me.
Q. He opened the door and said, This is Weeping Water?
A. "You folks have to change cars here."
Q. How far were you from the door?
A. I think I had the first seat.
Q. Did you have any conversation with any persons there at that time?
A. No, sir.
Q. Didn't Mr. Reckinger tell you it was the water station?
A. No, sir.
Q. When you started out at the water station didn't several persons tell you it was the water station?
A. No, sir.
Q. Didn't you hear anybody say it was the water station in the car?
A. No, sir.
72 Q. If it had been said there in a loud voice you would have heard it?
A. It looks that way to me.
Q. When you got on the steps where was the conductor?
A. Just coming around the train.
Q. Over towards the water tank?
A. Yes, sir.
Q. Coming down towards you?
A. Yes, sir.
Q. After he opened the door and said, This is the place for you to get off, then he jumped right back and ran around that train on the outside?

A. Yes, sir; unless I am mistaken.

Q. Went away from you towards the water tank, and then, as you got off, he walked back towards you?

A. I believe so.

Q. He had his lantern in his hand?

A. Yes, sir.

Q. When he got there he said, You have made a mistake?

A. No, sir; I asked him where the train was and he says, It went out here and you better get back on the train.

Q. Didn't he say, This is not the place to get off?

A. No, sir.

Q. Just says, You better get back on the cars?

A. Yes, sir.

Q. Did he assist your wife to get back?

A. Told her to get on.

Q. Didn't he take hold of her arm?

A. I don't know.

Q. Did you so testify?

A. I don't believe I did.

Q. He told her to get into the cars and he would take care of you and the children?

73 A. No, sir.

Q. Did you try to get on the car?

A. No, sir; because it started as soon as she got on.

Q. You and the conductor and the children were then on the ground?

A. Yes, sir.

Q. What did he say to you then?

A. Nothing.

Q. Did he take hold of the hand of one of the children?

A. No, sir.

Q. Did he walk ahead of you?

A. Yes, sir.

Q. Your wife had gone on the cars?

A. Yes, sir.

Q. You say he told her to get back in the car?

A. Yes, sir.

Q. And they would stop at the station?

A. Ye-, sir.

Q. He told her they would stop at the station for them to make the change for the car for Lincoln?

A. Yes, sir.

Q. For her to stay in the car?

A. He didn't say that; he says, You better get back on the cars and when they stop at the station get off.

Q. I will ask you if, on the former trial of the case, you testified to any such thing.

A. I believe I did.

Q. Didn't you testify on the former trial of this case like this:

"Q. Did you know this was the water tank where you stopped? A. No, sir; I did not till I got down. Q. What did you do then?

74 A. The conductor turned to my wife and told her to get on the car and as she got on the second step the train began moving?"

A. Yes, sir.

Q. Did you testify on the former trial of this case that he told her to get off at that station?

A. Yes, sir; I believe I did.

Q. Didn't he tell her to get on the cars and stay in there?

A. No, sir.

Q. Nothing of that kind?

A. No, sir.

Q. Did she go into the car?

A. I didn't see her.

Q. Where was she when you last saw her?

A. On the second step as the train was moving.

Q. Which way was she going?

A. West.

Q. Into the car?

A. Going up on the steps.

Q. Did she say anything when she got on the steps?

A. No, sir; I don't recollect.

Q. You and the conductor and the children walked along by the side of the cars?

A. They got ahead of us.

Q. The entire train?

A. I could not say. I had a good job with those children. I didn't notice much except they were passing me.

Q. The train kept passing until you heard the scream?

A. Yes, sir.

Q. Where were you when you heard the scream?

A. At the depot door.

Q. At about that time you didn't notice any stopping of the train?

75 A. I don't recollect about that.

Q. If the train had stopped you would probably have noticed it?

A. I don't know whether I would or not.

Q. Let me ask you—the water tank, you say, is 120 feet from the station?

A. Somewheres about that.

Q. They had a sleeping car on that train?

A. I couldn't say; it was quite long—over four coaches.

Q. Your wife was in the smoking car?

A. Yes, sir.

Q. You were in there also?

A. Yes, sir.

Q. When you got off at the water tank you got off the smoking car?

A. Yes, sir.

Q. How far then were you from the water tank when you stepped off that car?

A. I believe it was just about where that little office is—right east.

Q. Did you get off the east or west end of the smoking car?

A. East.

Q. Then if the engine stopped at the water tank for water you would be distant the length of the baggage car and smoking car from the water tank?

A. I don't understand you.

Q. If the engine stopped at the water tank and you got off on the east end of the smoker there would be between you and the water tank the smoking car and the baggage car?

A. Yes, sir; that is about right.

Q. As you walked the train moved right along by your side?

A. I think they did for a little space and then they went
76 faster.

Q. Got a little faster as they went up?

A. Yes, sir.

Q. The next thing you noticed was you heard the scream?

A. Yes, sir.

Q. You didn't notice any signal of the train before that—any whistle?

A. No, sir.

Q. Between the time you got off at the water tank and the time you heard the scream of your wife's, did you hear any sound of the whistle of that train?

A. I don't recollect.

Q. The conductor walked right along and in front of you all the way up to the depot?

A. Yes, sir.

Q. When your wife got on the train she knew the conductor was on the ground, of course?

A. I suppose she did.

Q. She must have known he was on the ground and was going to walk up with you and the children?

A. I don't know whether she paid any attention to it or not.

Q. The conductor made remark that you and the children should walk?

A. No, sir.

Q. Did you make the remark?

A. There were no remarks made at that time; he just told her to get on the train and ride down to the depot and then get off there.

Q. Then you added the words "get off there"? Isn't that an after-thought of yourself?

A. That was the meaning of it.

Q. That isn't the question. He told her to get on the train?
77 A. Yes, sir.

Q. Now, give his exact words.

A. Says "You ride down to the depot and when it stops you get off there."

Q. Why did you say that was the meaning of it just now?

A. I didn't get what you wanted me to say.

Q. Isn't that an after-thought that was got up afterwards?
A. No, sir; he said it.
Q. Couldn't be mistaken?
A. No, sir.
Q. Said that where she could hear it?
A. Yes, sir.
Q. At that time did he have hold of her arm?
A. I don't recollect.
Q. Where was he when he said it?
A. Standing on the platform.
Q. How close to the end of the coach?
A. Right close.
Q. You and your wife and children stood there, and he says this to the wife?
A. Yes, sir.
Q. After or before she started on?
A. Just as she started on.
Q. He said to get on and stay there and get off when the train stops?
A. Yes, sir; get off at the depot when it stops.
Q. You are positive of that?
A. Yes, sir.
Q. Couldn't be mistaken?
A. No, sir.
Q. "Go up to the depot and get off when the train stops?"
A. Yes, sir.
78 Q. As soon as you got off at the water tank you knew it was the water tank?
A. Yes, sir.
Q. You knew it wasn't the place?
A. I don't know.
Q. You had been to Omaha two or three times?
A. Yes, sir.
Q. Saw the cars changed there?
A. I never made the change. I always rode in the chair car.
Q. You didn't jump out of the car?
A. No, sir.
Q. Did you go to your wife as soon as she screamed?
A. Yes, sir.
Q. How far was she west of that depot?
A. A little past; I can't say.
Q. Give these gentlemen some idea—150 feet?
A. Yes, sir, I should believe it was.
Q. The train had gone to the switch?
A. Yes, sir.
Q. When you went up there and found your wife where was the train?
A. I don't believe the train was there any more.
Q. Where was it?
A. Pulled up.
Q. Where?

A. West of the depot.
Q. Then did it back down again?
A. I don't remember.
Q. You didn't notice the train any more?
A. No, sir.
Q. You didn't notice that train any more from the time
79 you got off to the time you heard your wife scream?
A. Yes, sir.
Q. You didn't notice the train stop?
A. I don't believe I do remember about that.
Q. You think it was at least 150 feet west of the platform where you found her lying on the track?
A. About that distance; maybe not quite that far.
Q. Was it across the street west of the platform?
A. No, sir; it was just here in the street.
Q. Was there any depot platform there?
A. Yes, sir; kind of platform between the rails.
Q. On the outside was there any walk or anything there?
A. No, sir.
Q. It was ground where she had fallen?
A. It was kind of platform between the rails.
Q. On the outside?
A. I don't think there was.
Q. Nothing but cinders?
A. Cinders.
A. The planks were between the rails and she was west of the end of the platform.
Q. Had she fallen west of the end of the platform?
A. Yes, sir; the place where she had fallen was west of the depot platform.
Q. In the street?
A. Yes, sir.
Q. In the place where she had fell was there planks between the rails or had she fallen out in the street?
A. It was in the street.
Q. Were there any lights in the depot as you noticed as you went up there?
80 A. Some lights inside.
Q. The conductor was on the inside with his lantern?
A. Yes, sir.
Q. Were you?
A. Yes, sir.
Q. As that train passed, if she went into the car, was there any brakeman or other employee near to you except the conductor?
A. That was all, just the conductor.
Q. Then the engineer in charge of the train, or anybody as far as you know, knew she had gone back in the car?
A. No, sir.
Q. At the time you heard the scream you and the conductor were together?
A. He walked ahead of us; got some start of us.

Q. He was nowheres near your wife when that scream was given?
A. He saw her before I did, because he was ahead of me; he started before I did.
Q. He wasn't in a position where he could have looked up and seen her jump from that train?
A. No, sir.
Q. So far as you know there was no employee in charge of that train that had any notice that she was about to jump off?
A. No, sir.
Q. What physician attended her?
A. Dr. Hall.

Redirect.

(Examined by WOOLEY:)

Q. Were your wife's limbs amputated?

Objected to as improper re-examination.
81 Overruled. Exception.

A. Yes, sir.
Q. What doctors performed the operation?
A. Dr. Hall, Thomas, and Root.
Q. In what way, if any, were Doctors Hall and Thomas connected with the defendant road?

Objected to — immaterial and irrelevant and not proper re-examination.
Overruled. Exception.

A. Hall and Thomas told me——
Q. Do you know of your own knowledge whether they were connected with the defendant road?
A. Yes, sir.
Q. State whether or not they were the company surgeons at that place.
A. Yes, sir, at that time.
Q. How long after the accident was it that amputation was performed?
A. About eight o'clock, three hours afterwards.

Recross-examination.

(Examined by WAGGONER:)

Q. How do you know Thomas and Hall are connected with the road?
A. From reports.
Q. You said you knew of your own knowledge.
A. He attended to their accidents.
Q. You have testified that you know of your own knowledge. Do you?
A. I know——
Q. Do you know of your own knowledge?

A. Yes, sir; I think I do, because he worked for the de-
82 fendant right along.
Q. How do you know?
A. There were cases before this.
Q. How do you know?
A. Saw it in the papers.
Q. Did you ever see him attending to any case before that?
A. No, sir.
Q. Then you don't know it of your own knowledge?
A. I heard he was employed.
Q. You heard he was employed? You heard somebody say that?
A. Yes, sir.
Q. You don't know of your own knowledge?
A. That is all I know.
Q. You said you knew it of your own knowledge. Was it true?
A. (Not answered.)
Q. How large a bundle did your wife have on the train?
A. I don't recollect whether she had one.
Q. Did you have a valise?
A. No, sir; I had a satchel.
Q. Didn't she have a bundle in her hand when she went in the cars?
A. I think she only had a satchel with her, as far as I remember.
Q. You don't remember of her having a bundle in her hand?
A. She had a shawl.
Q. Tied up in a strap?
A. I don't know.
Q. Didn't she have something wrapped up in a bundle that she carried back in the car, apples or something of that kind?
A. I don't remember.

Witness excused.

83 JAMES JOHNSON, being produced and duly sworn, testifies as follows:

(Examined by WOOLEY:)

Q. Where do you reside?
A. Lincoln.
Q. Where were you living in December, 1889?
A. One and one-half miles south of Weeping Water.
Q. I will ask you if you are familiar with the depot and the lay of the ground and condition of the tracks of the Missouri Pacific at Weeping Water.
A. Yes, sir.
Q. I will ask you to examine that map and state whether or not that correctly represents the condition of the tracks, depot, and other items noted upon the map as it stood at that time.
A. (Examining the map.) Yes, sir; I think it does.

Map is offered in evidence.
Marked Exhibit "B."

Q. Point out to the jury where the depot is.

A. Water tank about 150 feet east of depot (marked reservoir); depot is marked depot. This is the switch (indicating) that runs across the platform.

Q. State first what this dark line is.

A. Plank platform.

Q. I will ask you what this track marked "A" is called.

A. Lincoln switch.

Q. What is this point here marked "B"?

A. That is where the Lincoln switch leaves the main track and runs across the platform.

Q. This point marked "C"?

A. The main track running directly in front of the depot.

84 Q. This point down here marked "D"?

A. The road master's office.

Q. Now, what is this line, this dark line, marked "engine," "tender," "baggage car," *and* etc.? What does it represent?

A. That represents the Omaha train standing on the main line.

Q. What does this track marked "E" represent?

A. That is the main line of the Omaha track. That is where the train stops and makes transfers of baggage from the Omaha to the Lincoln train.

Q. Are you familiar with the manner in which the trains are made up there or were at that time, how they are uncoupled and coupled up, and what is done?

A. Yes, sir.

Q. Just explain to the jury when a train comes in from the south as that one did where did it stop.

A. First stops at the reservoir to take water. Then it moves up, and the engine runs past the depot, and then they stop in there in front of the depot, when the chair car gets in front of the depot. Then they stop and uncouple the Lincoln car. In the evening they take the car off and put it on the Omaha train. Then they uncouple it in the morning and goes back on the Lincoln train. They first stop at the reservoir and take water. They run past the depot till the chair car gets in front of it. Then they stop running and uncouple the Lincoln car. Then the engine, baggage and smoking car run up here to the platform and stops. That is where the passengers get off.

Q. The chair car doesn't go up?

A. One chair goes up.

(Examined by WOOLEY:)

Q. After they have uncoupled in front of the depot and

85 part of the Omaha trains runs up here (indicating) what does the Lincoln train do?

A. Backs down across this switch (B); backs off and couples onto the Lincoln car; then runs up here (indicating).

Q. Then what does the Omaha train do?
A. Backs down here and gets this sleeping car.
Q. Then what does it do?
A. Pulls up here and changes baggage.
Q. From the Lincoln to the Omaha?
A. Yes, sir.
Q. I will ask you if that was the manner of making up trains there at that time.
A. Yes, sir.
Q. Has there been any change since that time that you know of in making up trains?

Objected to as incompetent, irrelevant, and immaterial and not a proper issue in this case.
Overruled. Exception.

A. I don't know whether there has or not of my personal observation. I heard there had been a change.
Q. I will ask you if you recollect the circumstances of Mrs. Baier being hurt there at Weeping Water.
A. Yes, sir.
Q. Do you recollect the day of the month it occurred?
A. Yes, sir.
Q. What date was it?
A. I think 27th of December.
Q. What year?
A. 1889.
Q. State how you came to be there at the depot that morning.
A. I brought some people down from my house to take the train.
86 Q. Go on and state to the jury what you saw there in connection with this accident.
A. I was standing on the platform in front of the depot; I think it was in front of the window when the train pulled in. They stopped a few minutes in front of the depot. When they uncoupled the Lincoln car they pulled out, and a few minutes after I hear- a scream. I started to run in the direction from which the scream came, and run a little over a hundred feet, I think, and found a lady lying across the platform, and I picked her up—lifted her partly up—and then there was a gentleman, I think it was Fenstermaker, came with a lantern, and I saw her legs were cut off, and I think I told him her better run for a doctor. When I was helping her up I asked her who *who* she was, and she told me.
Q. I will ask you if, while you were helping her up there, the conductor came down there.
A. Yes, sir.
Q. Now, I will ask you to state what Mrs. Baier said at that time as to how the accident occurred.

Objected to as incompetent, irrelevant, hearsay, and immaterial and no proper foundation laid.
Overruled. Exception.

(Examined by WAGGENER:)

Q. Had the train gone at the time she made this statement?
A. No, sir; the train had pulled up to the platform and stopped.
Q. How long had the train been away from the spot where she was injured?
A. I don't think the train had come to a stop when I got there.
Q. How long after you heard the scream till you heard
87 this conversation?
A. Couldn't have been—I think it was two minutes.
Q. In the first place, Fenstermaker came with a lantern?
A. Yes, sir.
Q. You saw how badly she was injured?
A. Yes, sir.
Q. You told him to go for a doctor?
A. Yes, sir.
Q. He did go?
A. Yes, sir.
Q. You had a conversation with her after that?
A. Yes, sir.

(Question by COURT:)

Q. Was the conversation at that time?
A. Yes, sir.

(Examination resumed by WOOLEY:)

Q. She told where she came from and who she was?
A. I asked her how she came to get off the train. She told me her name was Baier, and that she was from Nehawka, and she said the conductor had told her—had come into the car when they got to the water tank and told them to get out at Weeping Water and change cars for Lincoln. When the train stopped at the tank she supposed it was the place, and they got off. Then the conductor told them it was not the station and they better got back on the train and ride up to the depot. She said she got on, but when she got on the steps the train pulled out and her husband and children didn't get on the train, and then she said, when the train stopped in front of the depot, she supposed it was the place to get off. She got out of the car and got onto the steps. Just as she was in the act of stepping off the train made a jerk and she fell off.

88 Defendant moves to strike out all of the statements of this witness of what Mrs. Baier told him after this accident because same is not part of the *res gestæ*, as hearsay and as incompetent, irrelevant, and immaterial and no proper foundation laid.
Overruled. Exception.

Q. What occurred after you had this conversation with her—what was done?
A. Then I hollered back to the depot for somebody to bring a stretcher and for a light. Immediately after that the conductor and Mr. Baier came walking up. In a few minutes somebody brought out a stretcher and we carried her into the depot.

Q. How long did she stay there in the depot?
A. Probably, I think, about one-half hour.
Q. What was then done with her?
A. Carried her into an empty store-room in town and laid her there. There is where the amputation was performed.
Q. Were you there till the amputation was performed?
A. Yes, sir.
Q. Who performed that amputation?
A. Dr. Thomas. Dr. Root assisted, I think; administered chloroform.
Q. Do you know whether at that time Drs. Hall and Thomas were connected with the defendant road?
A. Yes, sir; I know Hall was. I don't know about Thomas.
Q. What position did Dr. Hall hold with reference to the road?
A. He was company surgeon.

Cross-examination.

(Examined by WAGGENER:)

89 Q. What time in the morning was it you were there?
A. It was about half past four.
Q. Who else, if any one, was on the platform with you?
A. I think Mr. Woodward.
Q. Did you have a lantern?
A. No, sir.
Q. As the train moved up did you see any one on the steps of the smoking car or platform?
A. No, sir.
Q. If there had been any one there could you have seen them?
A. I expect I could if I had been looking that way.
Q. You were looking at the train?
A. Yes, sir.
Q. Was there any light at the depot?
A. Yes, sir.
Q. While you were standing there did you notice the conductor come up from the water tank with a lantern?
A. No, sir; didn't notice the conductor till he came up where the lady was lying.
Q. When the train moved up there how long did they stop for this uncoupling to be made?
A. I couldn't say exactly, only a few minutes.
Q. You testified on the former trial of this case it didn't stop to exceed one second.
A. I don't think I did. I couldn't say as to the time. I don't think I did because I had no way——
Q. I will ask you if you didn't say this: "If you will give it in seconds"? A. "Well, one or two seconds."
A. I may have said that.
Q. That is your recollection now?
A. I couldn't say as to the time. I think my testimony was then I couldn't give the time.

90 Q. Your recollection then, perhaps, would be better than now?

A. I don't know.

Q. If you testified in the former trial of this case it didn't stop to exceed one or two seconds, that is your testimony now?

A. If I testified to it.

Q. Did you so testify?

A. I don't know whether I did.

Q. Are you as positive as anything else you have testified to?

A. I am positive; I couldn't give the exact time.

Q. Did you not testify on the former trial of this case that it didn't stop to exceed one or two seconds?

A. I don't think I did.

Q. Were not these questions asked you: "How long were you standing there?" A. "Just a few minutes." Q. "If you will give it in seconds?" A. "Well, one or two seconds."

Q. Did you so testify?

A. I guess I did.

Q. This is one of these patent couplers?

A. Yes, sir.

Q. Didn't that train stop two or three minutes?

A. Yes, sir.

Q. Usual for them?

A. Yes, sir.

Q. You think now it did not stop to exceed two seconds?

A. I don't think I did testify to that; I said that was my judgment.

Q. Are these questions and answers correct?

A. I suppose they are.

Q. Then your judgment is it didn't stop to exceed two

91 seconds?

A. Yes, sir; that was my judgment.

Q. When it stopped there did you notice any person getting off?

A. No, sir.

Q. Did you notice any person attempting to get off?

A. No, sir; because——

Q. Did you notice anything unusual in the management of that train?

A. No, sir.

Q. You have lived there how long?

A. 12 years.

Q. Been at the train a great deal?

Move to strike out as to whether he noticed anything unusual.

Overruled. Exception.

Q. Which one of the chair cars was cut off from that train, the east or west?

A. Which chair car do you mean, Lincoln?

Q. One next to the sleeper.

A. There were two cars cut off from the end of the train, the sleeper and Lincoln chair car.

Q. What was there on the rest of the train?
A. Baggage car, smoking car, and one other chair car, three cars left.
Q. The train was cut into there between the two chair cars?
A. Yes, sir.
Q. So the train that started to move away was an express car, a smoking car, and one chair car?
A. I think so.
Q. As the train moved up did you notice and brakeman
92 on the platform, the end of that chair car that had been cut off?
A. I don't remember; I think he was; yes, sir; I think he was on the train that was moving off.
Q. You remember that?
A. Yes, sir.
Q. When the train started out where were you with reference to the east end of the chair car that was moving west?
A. I was a few feet west of that.
Q. Where it had been cut into?
A. Yes, sir.
Q. How many feet west?
A. Probably 10 feet.
Q. Ten feet west?
A. I couldn't say exactly.
Q. The running of the train up there and stopping it was done in a moment?
A. Yes, sir; very short time.
Q. The train wasn't stopped there over one or two seconds for passengers to *to* get off?
A. No, sir; I guess not; it wasn't intended for passengers.
Q. It was stopped there to cut this off and let it go on west?
A. Yes, sir.
Q. Then back down this switch you have indicated?
A. That is the Lincoln train.
Q. That was the way it was in the habit of doing?
A. Yes, sir.
Q. Where were you standing, with reference to the door of the depot, when the train moved on west that was cut off?
A. A few feet west of the door. I was right in front of the window; probably six or eight feet west of the door.
Q. Up to that time—up to the time the train started—you
93 noticed no person attempting to get off the car?
A. No, sir.
Q. You saw no person on the platform or steps of any of these cars?
A. No, sir.
Q. The train had gone how far when you heard this scream?
A. I couldn't say exactly. It hadn't gone far; probably 10 or 15 feet.
Q. Didn't you testify on the former trial of this case it had gone from 100 to 130 feet?

A. I don't know anything about how far it had gone; it was dark.

Q. What time, in seconds, intervened between the starting of that train and your hearing the scream?

A. I couldn't say; it was only a few moments.

Q. Thirty seconds?

A. I don't think it was that long.

Q. Fifteen?

A. May have been fifteen.

Q. How far was Mrs. Baier when you found her from the place where you started?

A. She was about 120 to 130 feet, I think, from the door of the depot.

Q. That would be about 130 feet from where you stood?

A. That would be about 120 feet from where I was.

Q. The car that was cut off—the east end of that car was in front of the depot door, you said?

A. Yes, sir.

Q. Do you know how long that chair car was?

A. I don't know exactly; cars are, I think, about 60 feet.

Q. And you stepped this off afterwards?

94 A. Yes, sir.

Q. It was 130 feet from the door to where you found her?

A. Yes, sir.

Q. When you heard this scream how fast was this car going?

A. It was going pretty fast. When I heard the scream I started up there and run as fast as I could and when I got there to where the lady was lying the train had stopped 150 feet beyond there.

Q. This train was going faster when you heard that scream than you could run?

A. Yes, sir; that is when I got up there.

Q. About how fast do you think you could run per hour?

A. I don't know; I never timed myself.

Q. I want to get at how fast that train was going when you heard that scream?

A. I don't know; probably not to exceed 10 miles.

Q. It started up there as soon as the signal to uncouple was given?

A. Yes, sir.

Q. It being a light train moved up very quickly?

A. Yes, sir.

Q. You suppose at the time you heard the scream it was going 10 miles?

A. Yes, sir; that would be my judgment.

Q. You say the train was not stopped there for passengers to get off?

A. I don't know about that.

Q. That is what you testified to?

A. It didn't stop long enough for passengers to get off.

Q. It didn't stop long enough to indicate that passengers should get off?

A. No, sir; didn't have time to get off.

95 Q. Didn't stop long enough for passengers to get off of the car?

A. No, sir.

Q. Not long enough to get off?

A. No, sir.

Q. It stopped long enough if a passenger was standing on the steps?

A. Yes, sir.

Q. You say you had a conversation with Mrs. Baier?

A. Yes, sir.

Q. What did she say about being afraid she was going to be taken to Omaha?

A. She said that when the train passed the depot, when the car she was in passed the depot, she thought there was the place she had to get off and she walked out on the platform and when she was in the act of stepping off——

Q. What did she say about thinking the train was going to Omaha?

A. When she passed the depot she was afraid they were going to Omaha.

Q. She got off because she was afraid of being carried to Omaha?

A. She didn't say that.

Q. When she passed the depot she was afraid she was being carried to Omaha?

A. Yes, sir.

Q. You understood that was the fact of being carried to Omaha?

A. No, sir; I didn't understand what that was.

Q. She said when the train passed the depot she got up to get off; she supposed the train would stop; then when it did

96 stop she walked out on the steps and when she was on the steps in the act of getting off the train gave a jerk. If she had got out you would have seen her?

A. No, sir; because her car was one car ahead.

Q. If she had stepped off of that end of the car she would have been about 60 feet closer to the depot than she was?

A. She was on the further end of the car, between the chair car and smoking car.

Q. The chair car was about 60 feet long?

A. Yes, sir.

Q. The east end was before the depot door?

A. Yes, sir.

Q. Where you found her was 130 feet from that door?

A. Yes, sir.

Q. More than two car lengths?

A. Yes, sir.

Q. So that that car must have moved 70 feet from the place where it stopped and the place where you found her?

A. Yes, sir.

Q. So that it was impossible for her to have been jerked off just as that train started after they stopped?

A. I don't know.

Q. If she had come out of that car and got on the end of that car and on the steps while it was standing there and just as she got on the steps it started she must have been about 60 steps from the depot door?

A. She may have held to the rail and the car carried her.

Q. I asked you if she had been thrown off.

Q. As it was, you found her over 130 feet?

A. Yes, sir.

97 Q. When this train got up to that point where you found her it was running pretty fast?

A. Yes, sir.

Q. About how fast would you say it was running when it got to the point where you found her?

A. I heard the scream directly after the train started, and I run and about the time I got there the train, I think, was just stopping, about 150 feet beyond where she was lying.

Q. That would make 280 feet from the depot door?

A. Yes, sir. I should judge it must have been running 10 miles an hour.

Q. You say you heard the scream directly after the train started up?

Q. How far had that train gone in feet before you heard that scream?

A. I think it must have gone about ten or fifteen feet; may have been more than that. I couldn't say.

Q. I will ask you if on the former trial of this case you didn't testify it had gone over 50 feet.

Q. If you didn't testify that the east end of that chair-car coach had got beyond the west end of the platform before you heard the scream.

A. Yes, sir; I expect I did.

Q. I will ask you the question, if the east end of that coach had got beyond the depot platform—the west end of it—before you heard that scream.

—. I think it did.

Q. How far beyond that?

A. I couldn't say.

Q. About how far?

A. I couldn't say; it was dark.

98 Q. What period of time elapsed from the time the train started up till you heard the scream? I believe you said 10 or 15 seconds.

A. Probably 10 or 15.

Q. You would say it wasn't less than ten or more than fifteen?

A. No, sir; I wouldn't; it would be impossible for me to tell or make a correct calculation.

Q. You could guess at it.

A. No, sir; I couldn't.

Q. You wouldn't be willing to say it was less than 10 or more than 30?

A. I wouldn't swear that. I would swear it wasn't 30 or less than 15.

Q. Will you swear it wasn't ten?

A. I wouldn't swear it wasn't ten.

A. No, sir.

Q. Either ten or fifteen, you think?

A. Somewheres along there. It would be impossible for me to make a correct calculation.

Q. You had quite a conversation with her there on the ground?

A. Yes, sir.

Q. Suffering a good deal?

A. Didn't seem to be suffering very much.

Q. Anybody present when she told you this?

A. No, sir; but Mr. Baier and the conductor came up.

Q. Then there was no person present when she told you?

A. I don't remember whether Fenstermaker was there or not.

Q. He had gone for a doctor, you said?

A. I think he had.

Q. Did he come back?

A. No, sir.

Q. You say she told you they got off at the station and the conductor told her to get back on the cars?

A. Yes, sir.

99 Q. She did so?

A. Yes, sir.

Q. When the train got up there she supposed she was going to be taken to Omaha?

A No, sir.

Q. And was afraid she was going to be taken to Omaha?

A. No, sir; she said she saw the train passing the depot, and the conductor had told her she must get off at the depot. She saw she was being carried past the depot, and she went out to get off.

Q. Were there any employees around there when she got off?

A. I don't know.

Q. Don't recollect whether there were or not?

A. I don't know.

Q. Were there any persons near there when she attempted to get off?

A. I don't know.

Q. Did you see any one on that end of the coach as it went by?

A. I think the brakeman was on the other end.

Q. The conductor couldn't see her?

A. No, sir.

Q. The engineer?

A. No, sir; I expect not.

Q. Don't you know it?

A. The engineer is supposed to be on the engine.

Q. Could the engineer have seen her attempt to get off of the car?

A. Not if he was on his engine.

Q. He was on his engine, as far as you know?

A. Yes, sir.

Q. Then, was there any employee of that company that
100 could have seen her attempt to get off, as far as you know?

A. No, sir.

(Question by WOOLEY:)

Q. I will ask you to point out on this map the point at which you found Mrs. Baier.

A. She was found a few feet west of this frog here, where the letter "B" is marked, probably not quite as far west.

(Examination resumed by WAGGENER:)

Q. Had the coach passed the frog?
Q. Was she found west or east of the frog?
A. West.
Q. The cars, in running over that, jolt there?
A. Slightly.
Q. Quite a jolt?
A. Yes, sir.
Q. Perceptible?
A. Yes, sir.
Q. When you found her there did she have a bundle?
A. A little bundle of apples—probably half a dozen apples. I think they were done up in a handkerchief.
Q. On the ground?
A. Yes, sir.
Q. Did she have a shawl?
A. Yes, sir.
Q. Fastened on her?
A. I think it was.
Q. Did she have on gloves?
A. I couldn't swear.
Q. Did she have any other bundle besides the apples and shawl?
A. No, sir.

Witness excused.

101 J. B. FENSTERMAKER, being produced and duly sworn, testifies as follows:

Q. Where do you reside?
A. Hamburg, Iowa.
Q. Where were you residing in December, 1889?
A. Weeping Water.
Q. What were you doing at that time?
A. Clerking in a hotel.
Q. What were your duties in reference to the trains?
A. I met the trains and got passengers.
Q. I will ask you if you recollect the morning when Mrs. Baier was injured.
A. Yes, sir.

Q. State to the jury what you saw in connection with that accident.

A. I was standing in front of the depot and the train come along. It was my business to see who got off, and I saw there was somebody going to get out of the smoking car, and the train stopped and I saw it was a lady. She seemed to be at the door, and I saw she was going to get off and went to help her—that is, that train stops long enough sometimes and sometimes it doesn't—perhaps sometimes two or three seconds and sometimes two or three minutes. I went to help this lady get off and I didn't get there. The train started, and as the coach passed me I jumped on.

Q. Which coach do you mean?

A. On the Omaha chair car. I hadn't gone a car-length hardly till I saw we were passing over something, and just then the woman screamed. She was right in front of me.

Q. What did you do then?

102 A. I jumped off an- ran to her.

Q. Who was there?

A. Johnson came up about the time I got there or a little later.

Q. Do you know how many cars were in that train that morning?

A. There was a baggage car, smoking car, two chair cars, and a sleeper.

Q. (Showing witness the map.) Suppose this to represent engine (marked "engine"), the second the tender, the third the baggage car, the fourth the smoker, the fifth the Omaha chair car, the sixth the Lincoln chair car, and the seventh the sleeper, where was the uncoupling made?

A. Made between the Lincoln chair car and the Omaha chair car right in front of the depot.

Q. As these cars were then standing out in front of the depot?

A. Yes, sir.

Q. You say you were standing there in front of the depot and started to run to the smoker?

A. To meet the person that was getting off of the train; before I could get to the smoker the train started up, and as it came along I jumped on, and I hadn't ridden over a car-length before I saw we had passed over this body.

Q. About how long in minutes or seconds did that train stop there to make that uncoupling?

A. That morning I don't think it stopped over three seconds.

Q. I will ask you if you have been to these trains frequently and after.

A. Yes, sir; every morning.

Q. I will ask you if you had been through the cars on this train frequently.

A. Yes, sir.

103 Q. Just prior to that time?

A. Yes, sir.

Q. I will ask you whether or not there was any notice in the cars warning the passengers as to where to get off the train.

A. Never saw anything of the kind.

Q. State to the jury in what manner they started up that morning after the uncoupling was made.

A. I didn't notice anything; it was running a pretty fair rate.

Q. Started up quick or slow?

A. I didn't notice; don't remember. I know I jumped on.

Q. How were they running at the time you jumped on?

A. They were going faster than I could walk.

Q. Did you hear any conversation by Mrs. Baier, anything said at the time you first saw her as to how the accident occurred?

A. No, sir.

Q. I will ask you to point out about the point on this map that you found Mrs. Baier's body.

A. It was right in there (indicating) by the frog marked "B."

Q. Do you know anything about the company making a change in the manner of calling the station there after that accident occurred?

Objected to as incompetent, irrelevant, and immaterial.
Sustained. Exception.

Q. You know of a change being made immediately after that?

A. It wasn't very long after that till I rode in one morning—it was a few days afterwards—and I noticed they didn't call the station till after they passed the water tank.

Q. Had you been down on the train frequently prior to this time?

A. Yes, sir.

104 Q. State whether or not prior to the time of this accident it was the custom to call out "Weeping Water" before they got to the water tank.

A. Yes, sir; then I have — on the train when they didn't call it.

Moved to strike out that portion of the evidence as to what he noticed after the accident.
Sustained. Exception.

Q. I will ask you if just prior to this time you had been on this train and heard the brakeman and conductor call out the station of "Weeping Water; change cars for Lincoln," before they reached the water tank.

A. Yes, sir.

Q. State whether or not prior to this accident this was their usual custom.

Objected to as incompetent, irrelevant, and immaterial.
Overruled. Exception.

A. I have been on the train when they would call it out before they got to the water tank.

Q. Answer the question.

A. Sometimes they would and sometimes they wouldn't.

Q. State whether or not prior to that accident you frequently

heard them call out the station, "Weeping Water; change cars for Lincoln."

Objected to as leading.
Sustained. Exception.

Q. State what the announcement was they would make before reaching the water tank.
A. "Weeping Water; change cars for Lincoln."
Q. How many stops does the train make there in coming into Weeping Water?
A. Two.
105 Q. State where these stops are.
A. One the engine stops for water; next time they stop with the Lincoln chair car in front of the depot.
Q. You said sometimes they stopped one or two seconds and then again two or three minutes?
A. Yes, sir.
Q. State whether or not you, as clerk of the hotel, in making these trains have frequently seen passengers get off at the depot when they would be uncoupling?
A. Yes, sir.
—. State whether or not that was generally the custom of passengers, to get off.
A. More frequent.

Objected to as incompetent, irrelevant, and immaterial.
Overruled. Exception.

A. They very frequently got off; I have kept lots of them there from getting off myself.
Q. Why?
A. Because it was dangerous; it wan't intended to get off there.
Q. State whether or not you ever heard employees of the road warn passengers about getting off at that stop.
A. No, sir; I never did.

Cross-examination:

Q. Who was on the platform with you that morning?
A. Johnson, some of his friends, and Mr. Woodard.
Q. You say the first stop the train makes is for getting water?
A. Yes, sir.
Q. The second stop is to uncouple the cars?
A. Yes, sir.
106 Q. The third stop is for passengers to get off?
A. Yes, sir; they are expected to stay on there till the train is made up.
Q. Before switching do the passengers get off?
A. Yes, sir.
Q. How long do the trains stop there in making this transfer?
A. 10 or 15 minutes.
Q. How long did they stop there that morning?

A. Most a half hour.

Q. As this train passed by just before the car was uncoupled did you notice any lady out on the platform of the coach?

A. No, sir.

Q. Did you see her standing on the platform of the coach as it passed by you?

A. No, sir.

Q. Did you notice any one standing on the platform of the coach?

A. No, sir.

Q. What kind of morning was that?

A. Cold, I believe.

Q. Clear or cloudy?

A. I think there were a few clouds in the sky. I didn't pay much attention to the morning. It was somewhat frosty.

Q. How many passengers got off that morning at Weeping Water?

A. I don't know. Two or three for the hotel.

Q. Do you know who they were?

A. No, sir; I don't remember. I think one was Mr. Mutz, of Auburn; travels from this town.

Q. Did you notice the conductor come up?

A. No, sir.

Q. Before the train stopped?

107 A. No, sir.

Q. Did you notice the brakeman of the train?

A. Yes, sir.

Q. Where was he?

A. West end of the Lincoln chair car; did the uncoupling.

Q. West end?

A. Yes, sir.

Q. That would be the east end of the Omaha chair car?

A. Yes, sir.

Q. He was between the two cars?

A. Yes, sir.

Q. These trains are coupled and uncoupled with these patent levers?

A. Yes, sir.

Q. Done very quickly?

A. Sometimes.

Q. As you stood on the platform as the smoker passed by you did you notice anybody of the platform of the smoker?

A. No, sir.

Q. You say you noticed some one in the act of getting out of the car?

A. Getting ready to come out.

Q. Of the door?

A. Yes, sir; standing in there ready to come out.

Q. That was in the east end of the smoker?

A. Yes, sir.

Q. When the train stopped and the uncoupling was made how far was the east end of the smoker from the depot?

A. Just the length of one car.

Q. About sixty feet?

A. Yes, sir; I suppose so.

Q. What was the distance between that point and the frogs up here?

108 A. I don't think it was over thirty or forty feet.

Q. Didn't you testify on the former trial of this case it was seventy-five feet?

A. Yes, sir; but I didn't know anything about it. I looked it up since.

Q. How far is that frog from the door of the station?

A. I should think it was—I would call it—I know last fall I didn't know anything about the distance. I never paid any attention to it, but I have been there several times and I should call it near 100 feet.

Q. I will ask you if it isn't just 130 feet.

A. I don't know.

Q. You never went there for the purpose of seeing it?

A. Yes, sir; we were talking about it and I just glanced at it.

Q. You never measured it?

A. No, sir.

Q. Then if Mr. Johnson has measured it you would conclude he was right?

A. I don't know anything to the contrary.

Q. When the train started you jumped on the train?

A. Yes, sir; as the end passed.

Q. You noticed nothing unusual in the motion of that train about that time?

A. No, sir.

Q. You got on the train and how far had you moved before you heard the scream?

A. I don't think over a car-length.

Q. At the time you heard the scream about how fast was the car moving?

A. I don't know.

Q. Twice as fast as you could walk?

109 A. I suppose it wasn't quite that fast, but pretty fast.

Q. When you heard the scream did you look right over the platform?

A. Yes, sir; it was right under me; I looked right at it.

Q. Did you hear the scream when the car passed over it?

A. Yes, sir.

Q. It was after she had fallen to the ground you heard the scream?

A. Yes, sir.

Q. Had she then fallen?

A. Yes, sir.

Q. How was she lying?

A. On her back.

Q. Which way was her head?
A. North.
Q. Feet were across the track?
A. Yes, sir.
Q. How far had the cars passed before you got off?
A. I think about 15 feet.
Q. Did you jump off while it was in motion?
A. Yes, sir.
Q. Have any difficulty in getting off?
A. No, sir.
Q. You are in the habit —?
A. I can get off a train.
Q. Did you have a lantern?
A. Yes, sir.
Q. Was there any platform where you got off?
A. Yes, sir.
Q. Sidewalk, rather?
A. Yes, sir.
Q. Board walk by the side of the track?
A. Yes, sir.
110 Q. Had the cars passed over these frogs at the time you heard the scream?
A. Just passing over them.
Q. What was the motion of the cars when they passed over these frogs?
A. I don't know.
Q. Did it make a slight, perceptible jar?
A. Yes, sir.
Q. Did she have any bundles with her?
A. Sack of apples.
Q. How many?
A. I don't know.
Q. Have a shawl?
A. Yes, sir; shawl and coat, I think.
Q. How long cloak and shawl?
A. I didn't notice.
Q. Have any gloves?
A. I didn't notice.
Q. Were there any other passengers hurt while getting off that morning?
A. No, sir; not that morning.
Q. Where was the brakeman at the time you got on the coach?
A. Just made the uncoupling and was standing on the end of Lincoln coach.
Q. He was on the train that was standing still?
A. Yes, sir.
Q. At the time this lady stepped off of the car was there any employee of the company in a position to see her?
A. Not that I know of; the brakeman and conductor wasn't; the engineer couldn't see her if he was at his post.

Q. If he was tending to his duties he couldn't have seen her?

111 A. No, sir.

Q. As far as you know, there wasn't any employee of the company in a position to see her when she attempted to leave the car?

A. Not that I know of; no, sir.

Q. You didn't notice any gentleman standing on the platform of the car as it passed by you?

A. No, sir.

Q. Was this lady conscious when you got down to where she was?

A. No, sir; she didn't faint, but the was doing some pretty wild screaming.

Q. How long did you remain there?

A. I helped pull her off of the track?

Q. How long did that take?

A. Mr. Johnson was there; it wasn't, I don't suppose, over a *a* half a minute.

Q. Was she screaming all this time?

A. No, sir; I don't think she was.

Q. Any of the passengers come around where you were?

A. I didn't stop to see.

Q. You went for a doctor?

A. Yes, sir.

Redirect:

Q. You stated, in answer to Mr. Waggener's question, that passengers were expected to stay on the train till the train was made up?

A. Yes, sir.

Q. Were there any rules of that kind passed that you know of?

A. No, sir.

Q. Would any person that wasn't familiar with the surroundings and the tracks and the way of making up the trains—would they have any notice of that on the part of the company?

112 Objected to as incompetent, irrelevant, and immaterial.
Sustained. Exception.

Q. How do you know the passengers were expected to stay on the train?

A. Because I know it would be dangerous to get off till they got through.

Q. All you know in regard to that matter is they didn't stop long enough for the passengers to get off?

Objected to as leading.
Sustained. Exception.

Q. You think that is the reason, because it is dangerous?

A. Yes, sir; that is the reason.

Q. You have travelled a good deal?

A. Some.

Q. I will ask you if ordinarily in your travels persons don't get off where the train stops at the depot.

Objected to as leading.
Sustained. Exception.

Q. I will ask you if you ever heard any directions given by any of the employees of the road to passengers about getting off there and not getting off there.

Objects to any negative testimony.
Overruled. Exception.

A. No, sir.
Q. I believe you stated you never saw any notices warning passengers on any of the coaches?
A. No, sir.
Q. Did you ever see any notices posted up at the depot at Weeping Water instructing passengers how to make the change there?
A. No, sir.
113 Q. In this coupling of the cars you say they run up there and stop a second sometimes, and other times longer?
A. Yes, sir.
Q. I will ask you whether or not prior to this accident you have seen them make a coupling without coming to a standstill.
A. No, sir; don't believe I ever did. Sometimes they stop a very short time.
Q. To refresh your memory, I will ask you if you haven't seen this train come up here opposite the depot and the brakeman throw the coupler without the train coming to a standstill, the front end come up to this Omaha train and this run across to the Lincoln train.

Objected to as incompetent, irrelevant, and immaterial and not within the issues of this case.
Overruled. Exception.

A. One time I seen the Lincoln coach and sleeper run up there.
Q. Then the coupling must have been made without coming to a standstill?

Objected to as leading.
Sustained. Exception.

Recross:

Q. Did you ever notice a sign on all these cars, "Passengers are not permitted to ride on the platform while train is in motion"?
A. Yes, sir.
Q. On all the coaches?
A. Yes, sir.
Q. Sign there, "Passengers are not permitted to be on the platform while train is in motion"?
114 A. Yes, sir.

Witness excused.

ETTIE BAIER, being produced and duly sworn, testifies as follows:

(Examined by WOOLEY:)

Q. You are a daughter of the plaintiff?
A. Yes, sir.
Q. The daughter of Catherine Baier, that was injured at Weeping Water in 1889.
Q. I will ask you if you were at the depot at Nehawka when your people took the train.
A. Yes, sir.
Q. State what you heard the conductor and brakeman say to them about which car to go into.

Objected to as leading.
Withdrawn.

Q. State what, if anything, you heard said by the conductor at the time your people were taking the train at Nehawka, your father, mother, and children.
A. They were just going into the chair car and the conductor told them to go into the car ahead; that was the smoker.
Q. How was your mother's health at that time?
A. Good.
Q. How was she as to being a strong, healthy working woman?
A. Strong and healthy.
Q. Did the work for the family?
A. Yes, sir.

Cross-examination:

Q. Where was the conductor when he made this statement?
115 A. East end of the chair car.
Q. On the platform or steps?
A. On the steps.
Q. Was the brakeman there with him?
A. I couldn't say.
Q. Your father and mother were on the west end of the car?
A. Yes, sir.
Q. Were they on the platform?
A. My mother and the children were; father was on the platform.
Q. Was he on the steps of the coach or platform of the coach?
A. Platform.

Redirect:

Q. Do you mean platform of the coach or depot?
A. I mean depot.

Recross:

Q. Not on the coach, then?
A. No, sir.

Q. Conductor was on the other end of the car?
A. Yes, sir.

Witness excused.

Deposition of A. P. Woodward, made upon the former trial, offered in evidence.

Objected to as incompetent, irrelevant, and immaterial, and not within the terms of the stipulation.

Withdrawn.

Plaintiff offers in evidence Carlysle's tables of the expectancy of life to show that at the age of # 42 years the expectancy
116 is # 26,34. The tables are found in Maxwell's Practice on page # 439, marked Exhibit "D."

OSWALD BAIER recalled.

(Examined by WOOLEY:)

Q. What was the condition of your wife's health that morning when you left Nehawka?
A. She was in good health.
Q. State whether or not she died as the result of these injuries, if you know.

Objected to as calling for the opinion of the witness; no proper foundation laid to show that he is competent to testify or give an opinion on the subject, and also as incompetent, irrelevant, and immaterial.

Sustained. Exception.

Q. State what her condition was from the time she was injured up to the time of her death.
A. She had both legs amputated and it caused her death.

Defendant asks that that part of the answer "it caused her death" be stricken out.

Consented to.

Q. I will ask you whether after this amputation was performed she at any time grew better.
A. Worse all the time.
Q. She died one week after?
A. Yes, sir.
Q. What was the day of the month she died?
A. 3rd of January.
Q. I will ask you what was the reasonable value of her services per week as housekeeper and work that she did.

Objected to as incompetent, irrelevant, and immaterial and
117 not within the issues of this case; no proper foundation laid, no allegation in the petition of any damages of that character.

Overruled. Exception.

A. I wouldn't miss her for $25.00 a week for these children.

Moved to strike out answer as not responsive to the question and as irrelevant and immaterial.

Sustained. Exception.

Q. What I mean, what was the work that she did there in the way of saving you from having to hire a girl to do the work; what was the actual value of the work that was performed there by her?

Objected to as incompetent, irrelevant, and immaterial and not within the issues of this case and not a proper item of damage and no foundation laid.

Overruled. Exception.

A. I don't think I could get anybody to do the work for less than $5.00 per week, the work that she did.

Defendant moves to strike out answer as not responsive to the question and as incompetent, irrelevant, and immaterial and not within the issues of this case.

Overruled. Exception.

Witness excused.

Plaintiff rests.

Defence.

Evidence of W. W. WILKENSON, taken on the former trial, offered in evidence and read to the jury by B. P. Waggener, of which the following is a correct copy:

Q. Was you at Weeping Water the morning of this accident to Mrs. Baier?

A. Yes, sir.

118 Q. Did you get on the train that morning?

A. Yes; I came down from Lincoln.

Q. Where were you going?

A. I was going to Omaha.

Q. What time in the morning was it?

A. It must have been — 4.30 and 5.00 o'clock. I don't remember exactly.

Q. Where did you get on the train? Was the train standing when you got on?

A. I got on the main-line train close to the water tank.

Q. Which coach did you get in?

A. I got into the smoker.

Q. Which end of the smoker?

A. I got in at the west end—that is, the head end.

Q. Had the train stopped to take water when you got in there?

A. Yes; it had.

Q. Where did you go when you got on the train?

A. When I got in the smoker I passed through the smoking car and out of the smoking car and into the first chair car and went about half way through the first chair car.

Q. How many people were in the smoker as you went through?
A. I think about ten or twelve persons, but I don't remember.
Q. When you got half way through the chair car where did you go?
A. I went for the purpose of getting a seat, but I saw it was full, and I turned round and passed back through the chair car, and out of the chair car into the smoker again.
Q. As you were passing back from the chair car into the smoker was the train moving on up to the depot?
A. Yes; I think it was.
Q. Did you take a seat?
119 A. I took a seat in the smoker.
Q. Whereabouts in the smoker did you take the seat?
A. I think it was the second seat from the door on the left-hand side or south side.
Q. That was the end?
A. That was the end of the coach; yes, sir.
Q. Where did you sit?
A. When I went in I sat down, as I often do, with my legs over the arm like that (indicating), so that I could see out of the door.
Q. After you had passed out of the chair car into the smoker and the train was moving up to the depot state if you noticed a lady come in.
A. When I had just taken my seat there was a lady come into the door and walked opposite the seat where I was.
Q. Did you know her?
A. No, sir.
Q. Did she take a seat?
A. She stood just a second and then took the next seat behind, not the alley, on the same side of the car.
Q. Did you notice her get out of that seat?
A. Yes.
Q. About where was the train with reference to the depot, when she got out of that seat of the car you were in?
A. To the best of my recollection, from the light shining from the depot and out of the car windows and from the platform, I think the depot was about forty or fifty feet west when she came into the car and when I noticed her.
Q. Was she in the car as you passed the depot?
A. Yes, sir; I think about forty feet. That is my recollection now.
120 Q. Did you notice her go out of the car?
A. Yes, sir.
Q. Was the car moving when she started to go out?
A. Yes, sir; the car was running when she started to go out.
Q. Did you hear her scream?
A. Yes, sir.
Q. From the time she started to go out of the car till you heard that scream did the car stop?
A. No.
Q. Which door did she go out of?

A. She went out of the east door or back door.
Q. The same door she came in at?
A. Yes, sir.
Q. As soon as you heard the scream did you go out?
A. Yes, sir; when I heard the scream the train was come to a stop.
Q. How far had the train run then?
A. I think about half a car-length, probably.
Q. What did you see when you got out?
A. When I got out I saw a lady on the platform and Conductor Day and one or two others.
Q. Have you been over that road a good deal?
A. Yes, sir.
Q. Did you see anything unusual that morning in the management of that train?
A. No; I did not.
Q. Any jerking of the train sufficient to throw a passenger off the car?
A. No.
Q. The lady you discovered was Mrs. Baier?
A. I heard it at the time.

121 Cross-examined by WOOLEY:

Q. Where do you say you got on the train?
A. I got on at the water tank or near to it.
Q. Which side of the train—east or west?
A. I don't remember whether it was the east or west side. It was close to the water tank, and I don't know — the train might have been moving when I got on. I know I walked down close to the water tank, because I had just come out of the Lincoln train.
Q. What did you go there to get on for?
A. I went down to take a sleep; I thought if I took a chair car I could get a sleep. I often do that going to Omaha.
Q. You went down before the other people to get a chair?
A. Yes.

By WAGGENER:

Q. The lady that came in back of you and took a seat—the lady you noticed—was the same that you afterwards found to be Mrs. Baier?
A. Yes; the same lady.

WOOLEY, resuming:

Q. The train did not stop till after the lady got on?

WAGGENER: He did not say that.

A. I did not say that; I said that after she went in the train did not stop till after she was hurt.
Q. She came in the car soon after you got on the train?
A. No; I did not say that; I said she came in soon after I had taken my seat in the coach.

Q. Which side did you take?
A. The left-hand side going west.
Q. Did the train stop close by there after she was hurt?
A. Yes; I think it was about half a car-length the train
122 ran after she was hurt. I cannot say half a car-length; it might not be that exactly, but it was in the neighborhood of half a car-length.
Q. How far west of the depot was the point where she was hurt?
A. In my best judgment—I never stepped the ground or measured it, but I judge in the neighborhood of two or three car-lengths from the depot window.
Q. Do you know whether or not this train had stopped after you got on till after the lady was hurt?
A. I don't remember.
Q. What is your best judgment?
A. It seems to me I don't have any remembrance of the train stopping from the time I got on till after she was hurt, but I would not say positive, because I don't——
Q. You made a written statement, in the form of an affidavit, to a Missouri Pacific attorney and detective before this suit was brought?
A. Yes, sir.
Q. They were after you to get that?
A. I don't know whether—I suppose they were.
Q. They hunted you up, you did not go to them?
A. Yes, sir; they never came to me for a long time, till I supposed the matter was brought up in some way or another; I don't know how.
Q. How long after the accident did you make this statement?
A. I don't remember the exact time now; it is quite awhile.
Q. What was there to challenge your attention that the train was moving at the time she got off?
A. Anybody by noticing could see that—by the lights moving on the platform you could tell that.
Q. Which lights were moving, your train or the Lincoln train backing down?
123 A. The Lincoln train never backs down till the Omaha train clears the switch.
Q. Had your train cleared the switch?
A. It had not cleared the switch when she got hurt.

Witness excused.

Evidence of J. H. McCHRISTIE taken on the former trial offered in evidence and read to the jury by Bailey P. Waggener. The following is a correct copy:

Q. You are an employee of the telegraph company, are you?
A. Yes, sir.
Q. Were you on this train on the morning of December 27th, 1889, when Mrs. Baier was injured?
A. Yes, sir.

Q. Where did you get on the train?
A. Sedalia, Missouri.
Q. What coach did you ride in from Nebraska City to Weeping Water.
A. In the smoking car.
Q. What part of the smoking car?
A. Near the front end of the smoking car.
Q. Do you remember the circumstance of seeing Mr. Baier and his family get on that train?
A. No, sir; I don't.
Q. Where did you first see them? Under what circumstances did you first see them? When was your attention first directed to them?
A. When the train stopped I went to the door and asked what station this was, and the lady answered Weeping Water.
Q. Where had the train stopped?
A. At the tank.
Q. The water tank?
124 A. Yes, sir.
Q. You were not familiar with the road?
A. No; it was the first time I was over it.
Q. Did you get on the platform?
A. Yes, sir. I went and asked the name of the station and this lady said "Weeping Water."
Q. Where was she?
A. Standing on the ground.
Q. What did you do?
A. I was there looking at the depot.
Q. After you had made the remark did the train start up?
A. In a few minutes, but not till she got on the train. The conductor helped her on.
Q. What did you do then?
A. I went back in the coach and got my baggage.
Q. Did the train start up then?
A. Yes, sir.
Q. Did you get your baggage? and where did you go?
A. I came back out on the platform.
Q. Had the train got up to the platform then?
A. Yes, sir; when I got out on the platform the train had passed the depot.
—. What part of the platform did you stand on?
A. Out near the railing.
Q. Of which coach?
A. The smoker.
Q. After that did you notice Mrs. Baier come out and come on the platform?
A. She was out there when I got out.
Q. You went out on the platform after the coach had passed the depot?
A. Yes, sir.
125 Q. What part of the platform was she on?

A. She was on the bottom step.
Q. Which way was she looking?
A. Looking back towards the depot.
Q. Back from the engine?
A. Yes, sir.
Q. From the time that you saw her, from the time that you went out and saw her standing on the step, state whether or not that car stopped till she fell or jumped.
A. No; it did not.
Q. Did any one speak to her?
A. Yes; two gentlemen, one in the chair car and one in the smoker, opposite.
Q. What did they say to her?
A. Told her not to get off.
Q. Said the train would stop or words to that effect?
A. They told her not to get off.
Q. What did she do after that?
A. She stepped off the train, holding the rail with her right hand.
Q. How long did she hold it?
A. I don't know the distance; four or five feet.
Q. You thought her hand lost hold on the railing?
A. Yes, sir.
Q. State whether the motion of the car dragged her loose.
A. Yes; the motion of the car dragged her loose.
Q. Where did you last see her?
A. Just as she fell on the platform.
Q. Did she scream?
A. Yes, sir.
Q. How far did the car run before it stopped?
A. About the length of the coach.
Q. Did you get off immediately?
126 A. No; I waited till it stopped still.
Q. Where did you go then?
A. I went to the Lincoln train.
Q. There was quite a crowd there?
A. No; not much of a crowd.
Q. Did you see the conductor afterwards?
A. Now, I don't remember.
Q. Did you know to what extent she was injured at that time?
A. No, sir; I did not.

Cross-examined by WOOLEY:

Q. You say when you got off you just went to the Lincoln train?
A. Yes, sir.
Q. You did not go back to see how badly she was hurt or anything about it?
A. No, sir.
Q. You did not take interest enough to learn whether she was alive or dead?

A. I knew she was injured and did not want to see her.
Q. You took so much interest as to know all these details?
A. I did not take much interest. I just took notice of the way she was standing.
Q. If you did not take interest enough to see whether she was dead or alive, how does it come you took this notice?
A. Whether she was dead or alive, I did not want to see the woman. I knew she was badly hurt, and I did not want to see her.
Q. Where were you first talked to about this accident?
A. At Lincoln.
Q. At Lincoln—when?
A. That morning, after the train got up that morning.
Q. Who interviewed you regarding it?
127 A. The conductor.
Q. The conductor—he came and asked you all about it?
A. Yes.
Q. Where did you come out on the platform?
A. At the tank.
Q. She came out?
A. She was on the ground then.
Q. She got on the lower step?
A. The conductor helped her on the step and said, "You ride to the depot." She went into the car ahead of me. I went and got my baggage, and when I came back she was on the step.
Q. Where was the train when she came back on the platform?
A. I don't know. When I got to the platform it had passed the depot.
Q. How much past the depot?
A. I don't know just the distance; about two car-lengths from where they left the coaches; about that.
By WAGGENER: If I understand, when you had the conversation you had you went and got your baggage?
A. Yes, sir.
By WOOLEY, resuming: Where did they cut off the cars?
A. Near the depot, I suppose. I did not see that. I did not look and did not see them cut off.
Q. Did you notice that they stopped at all?
A. Yes, sir.
Q. Why did you not get off?
A. I did not have time to get back then.
Q. You had left your baggage and did not have time?
A. No.
Q. When the train stopped you supposed that was the place to get off and started to get your baggage?

Waggener objects to what witness supposed.

128 Q. What made you go after your baggage?
—. Because it was my place to change.
Q. When you came back she was in the act of getting off?
A. Yes; the train was moving——

WOOLEY: I object to the answer. Answer my question. When you came back she was on the steps in the act of getting off?

A. (continued). Yes; she was standing on the bottom step there.

Re-examined by WAGGENER:

Q. Before you reached the water tank was there any cry or notice in that car of "Weeping Water"?

A. No, sir; I was listening for that, expecting to change cars, and I did not hear anything of the kind.

Q. Did you hear any cry after you left the tank?

A. No, sir.

Recross-examined by WOOLEY:

Q. You did not hear any cry at all?

Q. No.

Q. You are an employ- of the company?

A. Of the telegraph company.

Q. What telegraph company?

A. I am in the employ of the Pacific.

Q. Where did you come from this morning or yesterday?

A. Yesterday I came from Weeping Water.

Q. Where is your home?

A. Sedalia, Missouri.

Q. When did you come out from Sedalia?

A. I have been out of Sedalia about four weeks.

Q. Is not your home Council Grove, Kansas?

A. No; Sedalia.

Q. At whose request did you come here?

129 A. I got a message from Hammon to come here.

Q. Who is Hammon?

A. Sup't of the Missouri Pacific telegraph line.

WAGGENER: He came at my request.

Q. By what conveyance did you come?

A. I came on the train.

Q. Who paid your fare?

WAGGENER: He had a pass.

A. I had a pass up here.

Witness excused.

Evidence of E. W. BUTT, taken on the former trial of this case, is offered in evidence and read to the jury by BAILEY P. WAGGENER. The following is a correct copy:

Q. Where do you reside?

A. Hiawatha, Brown county, Kansas.

—. What is your business?

A. Farming.

Q. How long have you lived at Hiawatha?

A. 20 years.

Q. You came here at the request of the Missouri Pacific?
A. Yes, sir.
Q. Rode on a pass?
A. Yes, sir.
Q. Were you in this train on the morning of December 27th, 1889, when Mrs. Baier was injured?
A. Yes, sir.
Q. Where did you get on?
A. Nebraska City.
Q. What train did you take?
A. I took the passenger train.
Q. I mean what coach, I should say.
A. I took the smoker.
130 Q. What part did you sit in?
A. Nearly the front end—two-thirds of the way.
Q. With whom were you conversing, if any one?
A. Mr. Charles Carey.
Q. Where does he reside?
A. At Manley.
Q. A grain merchant there?
A. Yes, sir.
Q. Do you remember noticing Mr. Baier and his family in that car?
A. Yes, sir.
Q. Where did you first notice them in that car?
A. When we left Nehawka.
Q. What part of the car did they sit in?
A. Near the door—the one east.
Q. That would be the east end?
A. Yes, sir.
—. How many were there in the family?
A. I did not notice; there was a man and his wife and two children, I thought.
Q. Did you notice them in conversation with any one?
A. I did not.
Q. When did you first notice them first get out of their seats?
A. When they made a stop.
Q. At the water tank?
A. Yes. I did not notice the water tank at the time.
Q. At the time they made the stop at the water tank state if the conductor or any one else said anything to them.
A. This friend of mine said, "I would not get off; this is the water tank."
Q. That is Carey?
A. Yes, sir.
131 Q. Did he speak loud?
A. Yes, sir.
Q. Had any one else told them to get off?
A. No.
Q. Carey halloed not to get off at the water tank?
A. Yes, sir.

Q. They did not pay any attention to him?
A. No.
Q. Where did you next see them?
A. This woman went to the depot, I noticed.
Q. In the car?
A. On the steps.
Q. Did she come back in the car?
A. Not to my knowledge.
Q. After you left the water tank did you get up from your seat to go to the door?
A. Not till I got up to leave the train.
Q. That was at the depot?
A. Yes, sir.
Q. You were sitting near the front end of the car?
A. Yes, sir.
Q. When you walked back towards the east end of the smoking car, did you go back on the platform?
A. Yes, sir.
Q. Had you passed the depot when you were standing there?
A. Yes; we were past along by the depot then.
Q. Did you see the lady then or the lady you subsequently discovered to be Mrs. Baier?
A. Yes, sir.
Q. Where was she, on the platform or on the steps?
A. On the lower step.
132 —. What did she have hold of, if anything?
A. It looked to me as the railing.
Q. The railing of the car running up and down?
A. Yes.
Q. From the time that you saw her till she jumped did the train stop?
A. No, sir.
Q. Did you say anything to her?
A. She was looking towards the depot; I told her not to jump because they will stop.
Q. Did she jump?
A. Yes, sir.
Q. When the cars passed by did you see what happened?
A. No; I did not; I heard her holloo.
Q. How long did the car run before it stopped?
A. I don't know; I should not think more than the length of a car.
Q. Did you get out to see where she was?
A. I stepped aside and looked for the engineer of the train. I do not know who was running it. I did not see any one there and I went to see where she was.
Q. Where was she?
A. Some distance from the depot; I don't know how far; they were just helping her up.
Q. You went to help?
A. Yes, sir.

Q. Do you know how many trucks ran over her?
A. No, sir.
Q. Was she suffering a good deal of pain?
A. She seemed to be; she was groaning and hallooing.
Q. Was any conversation had between her and any one, to your knowledge?
A. I did not hear any one.
133 Q. While she was standing there on these steps, and while the train moved up, and before she jumped, state if there was any perceptible jerk or jar of that train.
A. I did not notice any.

Cross-examined by WOOLEY:

Q. Who else was on the steps besides you and the lady?
A. I did not notice any one, but I noticed *and* gentlemen soon after she jumped. They might have been there.
Q. After she jumped did a gentleman come on the platform?
A. I did not notice any one. I was looking at the woman.
Q. You say you first noticed her on the steps when you passed along by the depot?
A. Yes, sir.
Q. She was standing on the steps as the smoking car passed by the depot window?
A. Yes, sir.
Q. And after that she did not go into the car?
A. No, sir.
Q. When did that car stop; first, when a voice was heard were any cars standing over her, or had any cars passed beyond her?
A. I don't know. I did not see. I stepped off on the other side for a minute.
Q. Had the cars passed byond her?
A. Yes, sir; not me; I was on the train. I did not step off till the train had stopped.
Q. How many cars were there in the rear of you when you got off. How many cars were there in that part of the train that ran west?
A. I don't know how many cars were in the train. I was on the platform of the smoker and stepped off.
Q. You don't understand me (exhibiting map and indicating); you stepped off up here somewhere, did you not, up on this upper end of the platform west of the depot?
A. Yes, sir.
134 Q. You got off the smoker up here?
A. Yes, sir.
Q. How many cars east of you standing when you got off?
A. I don't know; I don't know how many cars were on; I did not notice.
Q. Did you see when they took the lady away?
A. Yes, sir.

Q. When you got back there, were there any cars standing over her, or had all the cars passed beyond her?
A. There were none standing over her.

Examined by WAGGENER on a question overlooked:

Q. About the announcement of the station at Weeping Water, did you hear any announcement in that car?
A. I did not hear any, no.
Q. Either before or after you got there?
A. No.

Cross-examined by WOOLEY:

Q. You knew that was Weeping Water?
A. Yes, sir.
Q. That had not been called to your attention?
A. The friend I was talking with said we must be at the station.
Q. At that time you were in the grain business?
A. Yes, sir.
Q. Shipping largely over the Missouri Pacific road?
A. I was not shipping.
Q. Had been?
A. No; I was buying for another firm.
Q. You were buying for Hurlburt; he was shipping over that road?
A. Yes, sir.
Q. Was the station of Nehawka called that morning?
135 A. I don't remember it.
Q. Was the station of Union called that morning in that car?
A. I don't remember any of the stations.
Q. You had been over the road often?
A. The first time I had been over that part.
Q. And you cannot say that any of these stations had been called?
A. No, sir.
Q. You would not undertake to say because you was not aware where Weeping Water was called, or whether it was called?
A. No; I don't.
Q. It may have been called before they reached the water tank or between the water tank and the depot or after they passed Weeping Water, for anything you recollect about it?
A. Yes, sir.

Witness excused.

Evidence of JOHN HASTIE, taken on the former trial of this case, is offered in evidence and read to the jury by BAILEY P. WAGGENER. The following is a correct copy:

Q. Where do you reside?
A. Auburn, Nebraska.
Q. How long have you lived there?

A. About twenty-one years.
Q. What business are you engaged in?
A. The stock business, grain, and coal.
Q. Were you on this train on the morning of December 27th, 1889, when Mrs. Baier was injured?
A. Yes, sir,
Q. What coach did you ride in?
A. The smoker.
136 Q. Do you remember the Baier family when they got on the train?
A. Yes, sir.
Q. What part of the coach did you sit in?
A. I was sitting in the rear end of the smoker.
Q. Where did they sit?
A. The first seat behind me, I think.
Q. How many were in the family?
A. There was a man and a lady and two or three children. I did not notice particularly.
Q. Did you have any conversation with them?
A. No, sir.
Q. Did you hear them have conversation with any one?
A. Yes, sir.
Q. With whom?
A. With a gentleman right opposite them. They were talking in German to themselves. I expect he made acquaintance with them there.
Q. He was a German also?
A. It seemed so. In the conversation between them they talked some German and some American language.
Q. Do you remember the conductor coming through to take up the tickets?
A. Yes, sir.
Q. Do you remember him telling them to change train at Weeping Water for the Lincoln train?
A. I think I did. I heard him tell them something. I don't know. I don't remember what it was. I did not notice that far.
Q. Have you been over that road by the train a good deal?
A. Yes, sir.
Q. Do you remember the train stopping at the water tank?
A. I remember the train stopped there by those behind
137 me saying, "This is Weeping Water. We get off here."
Q. Whom do you refer to—was it Mr. Baier and family?
A. Yes, sir.
Q. Did you hear anybody speak to them and say, "This is not the station"?
A. I heard some one speak. I don't know. I did not notice.
Q. What did he say?
A. This is not the station.
Q. Some one in the car?
A. Some one in the car.
Q. Did they get out?

A. I heard this man say, "I will help you (they had got a family with them). I will help you get those children out."

Q. This you suppose to be Mr. Reckinger, but you don't know?

A. I don't.

Q. When did you next see them?

A. The next I saw of the party I heard the door slam and looked round and saw this lady come in.

Q. Where was the train at that time with reference to the depot—east or west?

A. I suppose——

WOOLEY: Not what you suppose.

Q. Give your impression of the facts.

Wooley objects to the impressions of the witness.

Q. State the facts, as near as you can.

A. I know this: I know it stops at the tank usually, for I have stopped there many a time, and I wondered at them getting off there, but as I often get off at the Auburn coal shed because it is closer and shorter I did not think any more about it; thought they knew the way.

Q. While the train was in motion you noticed the lady in the car?

138 A. Yes, sir.

Q. Come in and take a seat?

A. I don't know. I did not take notice.

Q. What attracted your attention to notice her?

A. No more than the opening of the door and slamming, and I looked around and the lady was there.

Q. Where was the train then?

A. The train, to the best of my knowledge, was at the tank; that is where I supposed the train was.

Q. Had the train started when she came back into the car?

A. I don't know as to that.

Q. You did not notice?

A. No.

Q. Where did you next see her?

A. That is the last I seen her.

Q. She was at your back, towards the door?

A. Yes, sir.

Q. What next attracted your attention?

A. I did not know any more about this in particular until somebody came in and said, "There was somebody hurt out there." I heard some excitement, but did not go out.

Q. I will ask you if you noticed that morning anything unusual in the management and operation of the train.

Objected to as incompetent, irrevelant, and immaterial.

Overruled. Exception.

A. No.

Q. Did you notice at any time any jerk, jar, or jolt of the train?

A. No.

WATSON: That is pretty leading.

WAGGENER: Well, I suppose it is, but we get it better than by spending so much time.

139 Cross-examined by WOOLEY:

Q. You have been over the road often, you say?

A. Yes, sir.

Q. This car that the Lincoln people go to Lincoln in is right on the same train that comes from Auburn by way of Nebraska City to Weeping Water?

A. Yes, sir; so far as I know, it is.

Q. You know there is a car on that train they switch out on the Lincoln train?

A. Yes, which they have to switch.

Q. Passengers who go to Lincoln go on in the Lincoln car or get off and go in the Lincoln car when they get to Weeping Water?

A. Yes, sir.

Witness excused.

Evidence of C. E. CAREY, taken on the former trial of this case, is offered in evidence and is read to the jury by Bailey P. Waggener. The following is a correct copy:

Q. Where do you reside?

A. Manley.

Q. How long have you resided there?

A. Little over two years.

Q. What business are you engaged in?

A. Buying grain for O. P. Hurlburt, Qy., as to name Hickman.

Q. Do you remember the circumstance of the injury to Mrs. Baier on the morning of the 27th of December, 1889?

A. I got on at Nebraska City and was in the smoker. After we left Nehawka I noticed them sitting in the same car I was in.

Q. Where were you sitting?

A. I sat at the front end of the smoker, I think, about six feet back.

140 Q. Who were you talking to?

A. Mr. E. W. Butt.

Q. How many people were in the Baier family did you notice?

A. I did not notice particular.

Q. Which way were you facing?

A. I was facing them.

Q. With your back to the engine and Mr. Butt facing you and not facing them?

A. His back was toward them.

Q. Did you notice that the train stopped at the water tank?

A. Yes.

Q. Previous to that time was any announcement made in that car of the Weeping Water station?

A. I did not hear it.

Q. Had you seen the conductor or brakeman or porter in there after the conductor had taken up the tickets?
A. I did not to my knowledge.
Q. When the train stopped at the Weeping Water tank did you notice these people get off?
A. Yes.
Q. Did you say anything to them?
A. I told them not to get off there at the Weeping Water tank, the train would pull up to the depot.
Q. What answer did they make to that?
A. They did not make no answer; they got up and went out.
Q. You remained sitting?
A. Yes, sir.
Q. Saw they were gone?
A. Yes, sir.
Q. Never saw the lady again?
A. I did not.
Q. Did you hear a scream?
141 A. I did not.
Q. Did you know of the accident?
A. I knew it after the accident.
Q. Did you notice anything unusual that morning in the management and operation of the train.

Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception.

A. I did not.
Q. Previous to the time of this accident?
A. I did not.
Q. You have travelled up and down there a good deal?
A. Yes, sir.

Cross-examined by WOOLEY:

Q. You say you sat near the front end of the smoker?
A. I think it was about five or six seats; should the word "seats" be "feet" see previous answer.
Q. From the front end?
A. Yes, sir.
Q. Where did the Baier family sit?
A. They sat on the same side—that is, back towards the door, on the south end of the coach.
Q. They were right near the door?
A. They were pretty close there; yes.
Q. Pretty close to the door; you say when they undertook to get out you said that was not the station?
A. I got up and made the remark that was the tank and if they would wait the train would go up to the depot.
Q. You used all that language?
A. Just about as near as that.

Q. You say you did not notice any announcement of the station that morning?

A. I did not.

142 Q. Do they give that below the tank or above?

A. They might have done, but I did not hear it if they did make this announcement. Sloan, the agent, was laid across the way from me. He was asleep. I waked him up and we was talking then.

Q. You have travelled on train considerable?

A. Yes, sir.

Q. You know that in uncoupling cars there is frequently some jolt, some considerable trouble in making the uncoupling?

A. Yes, sir.

Q. If it had occurred there you would not pay attention to it?

A. I did not. I was telling in there how——

Q. If you were on a train today and such a thing as a jolt occurred in making the coupling, a month from now you would not know it?

A. Perhaps I would if it was a serious jolt; if it was not——

Q. If it was such a jolt as occurs ordinarily on trains you would not know about it a week after?

A. I might.

Q. And if a jolt in the train did occur this morning, an ordinary jolt such as would not throw you from your seat, you would not recollect it?

A. I would think nothing more of it.

Re-examined by WAGGENER:

Q. Was there anything unusual in the management of the train that morning that impressed itself on your mind?

A. I did not see nothing.

Witness excused.

Evidence of JOSEPH HALL, taken on the former trial of this case, is offered in evidence and read to the jury by Bailey P. Waggener. The following is a correct copy:

Q. What is your business or profession?

A. Physician or surgeon.

143 Q. Where do you reside?

A. Weeping Water.

Q. Do you remember the circumstances of the injury to Mrs. Baier on the morning of the 27th of December, 1889?

A. Yes, sir.

Q. Was you at the depot within two hours after you heard that she was injured?

A. Yes, sir; I was there within fifteen minutes afterwards.

Q. Where did you find her?

A. I found her in the waiting-room, on the cot.

Q. Did you have any conversation with her at that time relative to the accident and how it occurred?

A. Yes, sir; I did.
Q. Please state to the jury fully that conversation.

Wooley objects as incompetent, hearsay, not occurring at the time of the accident and not a part of the *res gestæ*.

Examined by WOOLEY:

Q. Were you present at the accident?
A. No.
Q. How did it occur?
A. It occurred at the regular train time.
Q. You know it occurred anyhow; but do you know of your own knowledge what time it occurred?
A. Only just that.

Examination resumed by WAGGENER:

Q. What time in the morning was you called there?
A. 4.30.
Q. What time is the train due there?
A. 4.30.

(By the COURT:)

Q. Where was she at the time?
144 A. Lying in the waiting-room at the depot, on the cot.
Q. Were you at home at the time they called you?
A. Yes, sir.
Q. Somebody came from the depot and called you?
A. Yes, sir.
Q. Who called you?
A. Fenstermaker.
Q. You were in bed?
A. Yes, sir.
Q. You got up and dressed and came to the depot?
A. Yes, sir.
Q. How far from the depot is your house?
A. Two blocks.
Q. You are the Missouri Pacific physician?
A. Yes, sir.

(By the COURT:)

Q. Were the trains still standing there at the depot?
A. Yes, sir.

Objection overruled and plaintiff excepted.

Q. State what was said.
A. I stepped up to Mrs. Baier and shook hands with her. I knew her and asked her how it happened, and she said that the conductor put them off at the water tank or they got off at the water tank and the conductor put them back on, and before Mr. Baier and the children got on the train pulled up and he said, "You stay in till you get to the depot; till they stop," and she says, "I went in and

the train went off. I thought they were going to take me to Omaha and I jumped off." She made the statement on several different occasions.

Cross-examined by WOOLEY:

Q. Mr. Travis, the attorney for Mrs. Baier, has been to you several times and asked you to state what Mrs. Baier said?

145 A. No.

Q. Mr. Travis never came to you and asked you about this matter?

A. Not to my recollection.

Q. Not to your recollection?

A. No.

Q. You say he told her to ride to the depot?

A. Yes, sir.

Q. That she went to get off and it started up?

A. No; she did not say that. She said they started up and she was afraid they were going to take her to Omaha and she jumped.

Q. She used that language, "They started up; she thought they were going to take her to Omaha and she jumped"?

A. Yes, sir.

Q. Did she say in that statement that the conductor told her to go to the depot when the conductor put them on at the water tank?

A. Yes; when the train stopped.

Q. That was what she said at that time?

A. Yes, sir.

Witness excused.

Plaintiff offers to allow the defendant to produce witnesses to prove what they offered to prove at the other trial, as is shown by question *number* # 869 of the bill of exceptions of the former case, and is as follows:

"Defendant offers to prove by the witness J. W. Thomas that about two hours — the accident he had a conversation with Mrs. Katherine Baier, the lady who was injured, and that she stated to him at that time that she supposed the train was going to Omaha, and while it was in motion she jumped off the train."

146 Deposition of MATTHEW RECKINGER is offered in evidence, the same as was used on the former trial of this case in the dist. court of Cass county, Nebraska. The following is a correct copy:

Q. State your name, age, occupation, and place of residence.

A. My name is Matthew Reckinger; age, 33 y'rs; farmer, and live at Mendota, Illinois.

Q. Where were you on the night of the 26th and 27th of December, 1889?

A. At Paul, Nebraska.

Q. Did you leave Paul, Nebraska, on that night; and, if so, when and how did you go and what — did you leave?

A. I left Paul, Neb., that night; I don't know what time: I think after midnight; I was going to Omaha on the Missouri Pacific railway.

Q. Did you pass through a place called Weeping Water, Nebraska, that night on that train?

A. I did.

Q. Do you recollect the circumstances of a woman by the name of Baier being injured at Weeping Water on that night?

A. Yes.

Q. Did you see this woman before the injury; and, if so, when and where did you first see her, and who, if any one, was with her?

A. I don't know the station where she got on. I saw her when she came into the coach. Her husband and children were with her.

Q. Which direction was the train going that night on which you and the Baier family were traveling?

A. Going north towards Omaha.

Q. How many stations, if you know, south of Weeping Water was it when Mrs. Baier, her husband and children, got on the train?

A. I don't know.

147 Q. What kind of a coach was it you and Mr. Baier's family were riding in approaching Weeping Water?

A. I don't know whether it was a smoking car or not. I was smoking in it.

Q. Were you riding on that train as a passenger or an employee of the company?

A. As a passenger.

Q. Did you hear any person connected with that train as an employee or any employee of the Missouri Pacific Railway Company announce in that car the station Weeping Water. And, if so, state fully where and when it occurred and by whom.

Question objected to by plaintiff as leading, complex, and incompetent.

A. I did not hear any one announce the station Weeping Water.

Q. Did you hear anything said by any employee of the defendant company about the station Weeping Water after Mr. Baier's family had entered and taken seats in that coach? If so, state when, where, and what it was.

A. I did not hear anything after she entered the car; but after she had entered the car the conductor came in and said, "You get off at the next station."

Q. How long was this before reaching Weeping Water?

A. I cannot tell.

Q. State as near as you can.

A. I don't know what length of time it was.

Q. Did you see the Baier family get off of the train; if so, when?

A. I did see them get off. There was a platform, but I don't know what place it was. (94.)

Q. Did you assist them in getting off?

A. Yes.

Q. Who else, if any one, assisted them?

148 A. I did not notice any one else.

Q. Did the entire family get off when you assisted them, including Mrs. Baier?

A. Yes.

Q. Was the train moving or standing still when they all got off?

A. Standing still.

Q. What did you next do?

A. I told them to look out for the train, and went back to my seat.

Q. Did you see any member of the Baier family in the car after that?

A. I saw Mrs. Baier come back into the car.

Q. Did any of the rest of the family come back with her?

A. No.

Q. What did she then do?

A. She stood there by the side of the seat she had just left. She was looking around. She then turned around and went to the back door, and while she opened the door the train started. She went out on the platform, and that was the last I saw of her until I afterwards saw her on the ground beside the railroad track.

Q. When Mrs. Baier started the second time to go out and the train started again to move, how far did the train move before it stopped again?

A. I should think about 75 or 80 feet.

Q. I will ask you to state whether or not the train was in motion when you last saw Mrs. Baier on the train.

A. It was moving when she was opening the door.

Q. You may state how it was moving with reference to jerking or otherwise.

149 A. I did not notice any jerk at all.

Q. When Mrs. Baier started to leave the car the second time, did she have anything in her hands or on her arms; if so, what?

A. I noticed something on her arm; whether it was a shawl or comfort I don't know.

Q. After the train started, before Mrs. Baier got off the second time, did it stop again until it had run, as you say, 75 or 80 feet?

A. No.

Q. Did you afterwards see Mrs. Baier on the ground?

A. No.

Q. Did you afterwards see her at all?

A. Yes; I saw her on the depot platform.

Q. How long after the train stopped did you see her?

A. As soon as the train stopped.

Q. Was she then in the place where she had alighted on getting off the cars or had she been moved?

A. I don't know.

Q. Do you know what the train stopped for the first time at Weeping Water?

A. No.

Cross-examination:

Q. You may state how many times the train stopped after you got to Weeping Water, where the Baier family got off, until the train left the place, including the first stop.

Objected to as incompetent, irrelevant, and immaterial.

A. They only stopped twice.
Q. At what point was the first stop in Weeping Water?
A. I don't know.
Q. Did the train not stop three times within the limits of Weeping Water?

150 Objected to as incompetent, irrelevant, and immaterial.

A. I only recollect two stops.
Q. Do you not know that the train first stopped at the water tank in Weeping Water; again in front of the depot to let loose the Lincoln coach from the Omaha train; then again west of the depot to exchange baggage, express, and freight with the Lincoln train?

Objected to as incompetent, irrelevant, and immaterial.

A. I don't know anything of it.
Q. Did Mrs. Baier come into the coach where she had got off and immediately turn around and open the door of the coach as the train started from the place where the whole family had got off? Answer "yes" or "no."
A. Yes; it was at that stop.
Q. Do you know whether or not there was attached to the Omaha train that morning a car called the Lincoln coach?
A. I do not know.
Q. Do you know whether or not there was a car called the Lincoln coach cut loose from the Omaha train that morning after you left the place where the Baier family got off the train?

Objected to as incompetent and irrelevant.

A. No.
Q. Are you willing to swear positively that the train did not stop or almost stop in front of the depot at Weeping Water on the morning of the 27th of December, 1889?

Objected to as incompetent, irrelevant, and immaterial.

A. I can't tell whether that was the depot when it stopped or not.
Q. Was it dark or light that morning?
A. It was dark.

Q. How far could you see and distinguish the features of
151 a person outside of the coach at the time the accident occurred?

A. I should think about ten feet.
Q. How many persons were in the smoking coach that morning?
A. I should think about twelve.

Q. Did you have any conversation with Mr. or Mrs. Baier before you got to Weeping Water that morning?

A. Defendant objects to the question as hearsay, incompetent, and immaterial.

A. Yes; I got acquainted with them.

Q. How long before you reached Weeping Water did you get acquainted with them?

A. Shortly after they came into the car I gave the children some apples. I heard them talking in German. I then commenced talking with them in German.

Q. Now, was this before or after the time when the conductor told them to get off the train at Weeping Water?

A. The conductor told them to get off the train at Weeping Water before I got acquainted with them.

Q. Who helped Mr. and Mrs. Baier and the children off the train besides yourself?

A. I did not notice any one else.

Q. Did you not see the conductor or brakeman there at that time?

A. I saw neither of them there.

Q. How long did the train stop at that place where they got off?

A. It could not be over five minutes.

Q. Mrs. Baier then stayed outside of the coach some time longer than you did, did she?

A. Yes; she stayed longer than I did; I went right into the car.

Q. You do not know, then, whether or not the conductor
152 or brakeman put her back on the train at that point?

A. No.

Q. Do you mean to say that the train only moved 75 or 80 feet from the place where Mrs. Baier got off and on the train to the place where she was found?

Objected to as improper, incompetent, and immaterial and not a cross-examination of any fact brought out on direct examination.

A. My opinion is that it is that far, as I got out of the coach when the train stopped and ran back.

Q. Don't you know that it is 200 feet and not 75 or 80 from the point where Mrs. Baier got off and on the train to the point where she was found lying on the track with her legs cut off by the train?

A. No; I don't.

Q. Then the train must have stopped at a point 75 or 80 feet west of the place where Mrs. Baier got off and on the train, whether that point is in front of the depot or west of it?

Objected to by defendant as argumentative, incompetent, and immaterial.

A. It was my opinion that it was that far.

Q. State whether or not you have since the accident signed any

statement or paper prepared and presented to you by the agents of the defendant company.

Objected to as incompetent, irrelevant, and immaterial.

A. I did not receive any paper from the company. A man coming to me, I don't know who he represented, and asked me what I knew about it, and I told him and he wrote it down. After I signed it he told me he represented the company.

Q. Did you read the statement over yourself before you signed it? Answer "yes" or "no."

153 Objected to as incompetent, irrelevant, and immaterial.

A. No.

Q. Of your own personal knowledge of an inspection of the paper itself do you know whether the man wrote your statement just as you stated? Answer "yes" or "no."

Objected to as incompetent, irrelevant, and immaterial and being an attempt to cross-examine as to matters not brought out on direct examination and on matters which constitute no part of the deposition.

A. No; I did not read it, but it was read over to me just as I gave it.

Q. Do you know whether or not Mrs. Baier got off the train while it was in motion?

A. It was in motion when she opened the door and went out. I did not see her get off.

Q. If the paper which you signed for the company states that no employee of the company told the Baier family or any of them to get off at Weeping Water before the first stop was made at Weeping Water, then that part of that statement is in conflict with the statement made by you in your direct examination today, is it not?

Defendant objects to this question as argumentative, calling for the opinion of the witness, incompetent, irrelevant, and immaterial and an attempt to cross-examine on a matter not brought out on the direct examination and about a paper not presented to the witness and which is no part of the testimony of this witness.

A. I did not hear the conductor call the station, but did hear him tell the Baier family to get off at the next station.

154 Defendant moves to strike out the last answer for the reason that it is not responsive to the question and for the reason mentioned in the objection to the question.

Redirect examination:

Q. You say you heard a scream and ran out of the car door. When did you first hear the scream?

A. I heard it before the car stopped.

Q. I will ask you to state whether or not you first heard that

scream between the time that Mrs. Baier went out onto the platform the second time and the time the train first again stopped.

A. Yes.

Q. Who uttered the scream, if you know?

Objected to as incompetent, giving the opinion of the witness.

A. I suppose it was the lady that had her legs cut off.

Q. You say you heard a scream and ran to the door of the car and jumped off and ran back to where Mrs. Baier was? What was she doing when you got there?

A. She was sitting there suffering a good deal.

Q. I will ask you to state whether or not the train stopped between the times when you saw Mrs. Baier go out on the platform the second time and the time you heard her scream.

A. No.

Recross-examination:

Q. Where do you reside?

A. I live about two miles south of Mendota, Illinois, on a farm.

Q. Where were you when you heard the scream first?

A. I was sitting down in the passenger car.

Q. What did you do when you heard the scream?

155 A. I left my seat and went out to the door, jumped off, and ran back to where she was.

Q. Whom did you see standing on either of the platforms of the smoker or Omaha car?

A. I did not see any one when I went out.

Q. When you arrived at the spot where Mrs. Baier was lying whom did you see, if any one?

A. I saw a good many people there, but did not know any of them, except my partner, an engineer whose name I do not know.

Q. What do you mean when you say the engineer, my partner?

A. It's like this: If a stranger comes to me and asks me for something he will say, "Partner, can you give me something?"

Q. What sort of a looking fellow was this partner engineer?

A. A man about 40 years old, a dark suit of clothes, dark complexion, wore a moustache.

Q. When did you first get acquainted with him?

A. He came into the car at Nebraska City and told me he was going to Omaha.

Q. Did you see the conductor of the train about where Mrs. Baier was after she was hurt?

—. No.

Q. Did you see the brakeman about where she was after she was hurt?

—. No.

Q. Do you know when or where the Lincoln coach was detached from the Omaha train after the train left the point where it first stopped in Weeping Water?

A. No.

Q. Did you see any such person on the train that morning whom you have heard described as porter?

Objected to as incompetent, irrelevant, and immaterial and not a cross-examination of any point brought out or disclosed by the direct testimony.

A. I did not see any.

156 Q. From your personal observation—I mean what you saw with your own eyes—do you know how and in what manner and through whose fault Mrs. Baier was hurt on the morning of December 27th, 1889? And, if so, state any facts upon which your knowledge is based.

Defendant objects to so much of the last question as relates to testifying about whose fault was the cause of the accident to Mrs. Baier as calling for the opinion of the witness, incompetent, irrelevant, and immaterial.

A. I cannot give any evidence as to whose fault it was.

Q. Then, as a matter of fact, Mr. Reckinger, you know nothing about this case except what you have testified to as occurring at the first stop, and that you afterwards saw Mrs. Baier upon the platform in a state of great suffering?

Objected to as calling for the opinion of the witness, argumentative, incompetent, irrelevant, and immaterial.

A. Yes.

Redirect examination:

Q. In the last question on cross-examination *on* you were asked if all you know about the case is what you testified to at the first stop and afterwards seeing Mrs. Baier on the platform in a state of great suffering. I will ask you to state if it is not true that all of your testimony as given in this deposition is based on your knowledge of the facts.

Objected to as incompetent, irrelevant, and immaterial and improper and leading and not redirect examination.

A. Yes.

MATTHIAS RECKINGER.

Then follows the certificate of the notary.

157 E. P. LOCKE, being produced and duly sworn, testifies as follows:

(Examined by WAGGENER:)

Q. Where do you reside?

A. Kansas City.

Q. What is your business?

A. Conductor on the Missouri Pacific.

Q. How long have you been conductor and in the railroad business?

A. Twenty-five years.

Q. Were you conductor of the train the night or morning of this accident to Mrs. Baier?

A. Yes, sir.

Q. What time did this train get to Nehawka that morning?

A. 4.10.

Q. How long did you stop there?

A. Just enough to take his family.

Q. Did you see them get on the train?

A. I was on the other end of the coach. The brakeman put them on.

Q. Did you give them any instructions at that station to get into the smoking car?

A. No, sir; because I didn't know where they were going till I came through for the tickets.

Q. When you came through to take up their tickets you found they were destined for what point?

A. Lincoln.

Q. What did you say to them then?

A. Change cars at Weeping Water.

Q. Did you have any other conversation before you got to the water tank?

158 A. No, sir.

Q. What occurred at Weeping Water?

A. We stopped.

Q. For what purpose?

A. Take water.

Q. How far is that water tank east of the depot station?

A. I never paced it, but I presume 100 feet; maybe a little more.

Q. How many cars did you have in the train?

A. Five.

Q. What were they?

A. Sleeper, two chair cars, coach, and baggage car.

Q. You stopped at the water tank for water?

A. Yes, sir.

Q. What next attracted your attention?

A. As we stopped there we always go between the chair cars to see that everything is all right to make the uncoupling, and as I came out I found this family on the ground.

Q. From where?

A. Between the chair cars.

Q. As I understand, as the train stopped for water you went between the Lincoln and Omaha coach?

A. Yes, sir.

Q. That would be the west end of the second car from Weeping Water?

A. Yes, sir.

Q. For what purpose?

A. Uncoupling the chains so the stop in front of the depot would be as short as possible.

Q. Previous to this time had you been in this car these
159 people got on?
A. No, sir.
Q. What car had you been on?
A. Weeping Water chair car.
Q. After you took up their tickets what car did you ride in?
A. Weeping Water car.
Q. When the train stopped at the water tank were you and the brakeman at that end?
A. Yes, sir.
Q. Was there any employee of the train in the smoking car after you took up their tickets, to your knowledge?
A. Not that I know of.
Q. After you found this family on the ground what did you do?
A. Told them they should have stayed on the train till they got to the station. I helped her on the train and was going to put the rest on, but found I wouldn't have time to put them on and I said, "You stay on the car and I will bring the family to the station," which I did.
Q. At that time did you give her any directions about getting off the car?
A. No, sir; didn't have time.
Q. What did you do then?
A. Went up to the station with Mr. Baier and the children.
Q. State if that train stopped for any perceptable length of time before this accident.
A. You mean in front of the depot?
Q. Yes, sir.
A. We stopped long enough to uncouple this car.
Q. How long?
A. Two or three seconds, just long enough to throw over the lever.
Q. Explain what kind of a coupler you have.
A. Patent coupler, just throw a lever over.
160 Q. Then it is uncoupled?
A. Yes, sir. I usually stand on the platform and give the signal to go ahead as soon as possible.
Q. I will ask you if you stopped there to permit passengers to get off.
A. No, sir.
Q. Where do your passengers get off?
A. At the platform here.
Q. How long do you usually stay there?
A. I think we get there at 4.30 and are due to leave at 4.43, usually 13 minutes.
Q. From 10 to 15 minutes?
A. Yes, sir.
Q. Did you know this lady had any intention of leaving this train while in motion?
A. No, sir.
Q. Was she instructed to leave that train?

A. Not by me.

Q. Was there any employee in a position to see her if she attempted to leave the train?

A. No, sir.

Q. Where was she found with reference to the west end of the depot?

A. I haven't measured it or stepped it off, but I would say it can't be much more than 30 or 40 feet where she was found.

Q. That is up by the switch?

A. Yes, sir; just past the switch here.

Q. How far past the switch?

A. 10 or 15 feet.

Q. You never have stepped it off?

A. No, sir.

Q. I mean to ask you how far it was from the west end of
161 the depot up to the frog.

A. About twenty feet.

Q. From the depot to the frog; I don't mean the switch. This gentleman said it was 130 feet.

A. I haven't measured it.

Q. Where was she found with reference to that frog?

A. Right beyond the switch at the end of the platform.

Q. Where were you when you heard the scream?

A. Just coming to the south end of the platform.

Q. Did you go directly up there?

A. Yes, sir.

Q. How quick did it take you to go up there?

A. Walked up pretty quick.

Q. When you got there who was there?

A. I couldn't tell.

Q. Did you hear any conversation between her and anybody else?

A. No, sir.

Q. Was she in a condition at that time to tell how that accident happened? State whether she was suffering a good deal.

A. Yes, sir; making a good deal of noise.

Cross-examination.

(Examined by WOOLEY:)

Q. How long have you been on that run at the time of this accident?

A. Third trip.

Q. You were not very familiar with that part of the road?

A. Not very.

Q. How many times had you been over that road previous to your taking charge of the train?

A. Once up and back.

162 Q. Once previous to that time?

A. Up and back, being over the road twice.

Q. You say when these people got on at Nehawka you didn't give any instructions to go into the smoking car?

A. No, sir.
Q. Do you know whether your brakeman did?
A. I don't know. I think he did.
Q. Why did he do that?
A. I don't know. I don't think he knew where they were going.
Q. You say your brakeman called to them.
A. I think he did.
Q. You say when you got to Weeping Water you cut the air between the two chair cars when you stopped to take water?
A. I always cut the air, unhook the chains, and get everything in readiness.
Q. Why did you do that?
A. Not to stop at the station any longer than possible and not to give the people a chance to get off.
Q. People wanting to take the train at the depot—they can't take the train?
A. No, sir.
Q. And those people that are waiting to take the train have to walk up to where they transfer baggage?
A. Not that far.
Q. Very near a block?
A. Yes, sir; one-half a block.
Q. Why, if you know—why don't this company stop their trains at the station so people can come and take the train there?

Objected to as incompetent, irrelevant, and immaterial.
Overruled. Exception.

A. I don't know; that isn't part of the business.
Q. As a matter of fact, the way you manage trains at Weeping Water, a person that takes the Omaha train has to come out
163 of the depo and walk fully half a block?

Objected to as leading and not the facts.

Q. State the facts.
A. They do that.
Q. A person getting off of that train and walking into the depot has to walk back nearly a block?
A. Yes, sir.
Q. You say this was your third trip?
A. I think it was.
Q. I will ask you what was your custom about calling the station Weeping Water. Where did you first call it prior to this accident?
A. I couldn't tell you. I think it is just the same now as it was then. The custom is to call it after we leave the tank.
Q. I will ask you if soon after this accident occurred you had a watchman there to prevent people from getting off the train when you made the uncoupling.
A. Not that I know of.
Q. I will ask you if sometimes in making that uncoupling there, opposite the station, that it didn't take you two or three minutes to do it.

A. I don't know that it has.

Q. I will ask you if sometimes this lever is hard to pull over and it takes some little time to do it.

A. Very seldom. We use the Miller coupler.

Q. I will ask you if in your experience it hasn't happened that the brakeman has to go to the engine and get a bar and throw this lever over.

A. Yes, sir.

Q. It does happen?

A. Yes, sir.

164 Q. When you stop that way you know people get off at that station?

A. When we stop for a length of time.

Q. You never gave any directions, nor did your brakeman, for the passengers to keep their seats till you got up to this point above the depot?

A. Things like that very seldom occur.

Q. You know passengers ordinarily get off the train when it stops at the depot?

A. Yes, sir.

Q. At this point, Weeping Water—this station, Weeping Water—you never gave directions to the passengers to remain on the cars till you pulled up to this point nearly a block above?

A. Not unless something of that kind occurs.

Q. Did you ever give them any direction?

A. Not at that station; I don't believe I ever did. I never stopped there long enough.

Q. When these people were off on the ground at the water tank, the place where they would get off or did get off would be down here close to this point where the road master has his office?

A. Further back.

Q. Little further back?

A. Yes, sir.

Q. And your car, or front part of the car, would be standing right opposite; I mean the hind end of the smoking car would be standing right opposite that place?

A. About the middle of the car.

Q. This platform that runs by this depot begins down here close to the water tank?

A. Yes, sir.

Q. It goes past the depot on up to the next street nearly a

165 block away?

A. The street runs across north and south.

Q. These people, when you found them, were here on the ground, at a place about 120 feet from this sidewalk here at the tank?

A. Yes, sir.

Q. Why did you put this woman back on the train instead of letting her walk up to the platform?

A. I thought I would save her the walk.

Q. What did you say to her?

A. Stay there; I would bring the children up.

Q. Use your exact language.
A. "Get on and stay there and I will bring the family up."
Q. You answered Mr. Waggener you told her to get on and ride up to the station?
A. Yes, sir; I presume.
Q. Get on and stay and ride up to the station?
A. I told her to get on and ride up; I would bring the family up.
Q. You told her to get on and ride to the station?
A. I don't think I said station.
Q. Where did you tell her to ride?
A. I didn't say anything; I didn't have time.
Q. You told Waggener you said "Ride up to the station."
A. Hardly said anything; I don't think I had time; told her to get on and I would bring the children up.
Q. Did you tell her how many times it would stop?
A. No, sir.
Q. You didn't tell her to stay on till it had gone past a block?
A. No, sir; didn't have time.
Q. As a matter of fact, you did go about a block above to where you transfer baggage?
A. Yes, sir.
166 Q. That was where you expected her to get off?
A. Yes, sir.
Q. You didn't tell her anything of the kind?
A. Didn't have time.
Q. Didn't you have time between Nehawka and Weeping Water?
A. I didn't do it. I didn't think it was necessary.
Q. Did you know they knew nothing about the station at Weeping Water?
A. No, sir.
Q. You presumed they did know?
A. Didn't think anything about it.
Q. You didn't care whether they made the change right or not?
A. I think I am pretty careful with them.
Q. Why didn't you tell them on the way from Nehawka to Weeping Water when you had time—tell them what place they would have to change cars?
A. When they got on I told them they would have to change cars.
Q. Did your brakeman come into the car just before coming to the water tank and say, "Weeping Water, next station"?
A. I don't know.
Q. Do you know he didn't?
A. I don't think he did.
Q. What do you know about what he did?
A. Nothing.
Q. If he did before coming to the water tank any passenger would get off when they made the stop at the water tank?
A. Yes, sir.
Q. That was just what these people did?

A. I don't know whether he did or not; I didn't hear him.

167 Q. After you found her on the ground you put her back?

A. Yes, sir.

Q. And told her to ride to the station?

A. Yes, sir; I would bring the children up.

Q. You didn't give her any directions about where to get off?

A. No, sir; had no time.

Q. In your experience in railroad business, when your train gets opposite the depot the passengers get off?

Objected to as calling for a conclusion.

Overruled. Exception.

Q. Unless they were directed otherwise?

A. Yes, sir; if they had time.

Redirect:

Q. In your experience as a railroad man, is it a proper thing for people to jump off while in motion?

A. They do sometimes, but it isn't supposed they should.

Q. Are you supposed, in your business, to take precaution to prevent jumping off trains in dangerous places?

Objected to as irrelevant and immaterial.

Q. Did you have any reason to believe at that time that that train would stop long enough for passengers to get off there?

A. No, sir.

Q. Was there anything about the train that morning that you discovered which would indicate the delay would be anything but momentary?

A. No, sir.

Q. You say in your cross-examination it was not intended to get off at that point.

A. No, sir.

168 Recross:

Q. You say there wasn't anything to indicate that the stop would be more than momentary?

A. No, sir.

Q. Were you the party that throws the levers?

A. No, sir; the brakeman.

Q. How did you know what condition the levers were in?

A. Never knew until we tried them.

Q. Why dou — say you didn't know the stop would be more than momentary?

A. Because there very seldom is.

Q. But it is sometimes?

A. Yes, sir.

Q. You didn't know that morning whether it would be stopped three minutes or three seconds?

A. No, sir.

Redirect:

Q. As a matter of fact they did stop there over a second to throw that brake?

A. Not over two or three at the outside.

Witness excused.

Evidence of A. B. WOODARD, taken on the former trial of this case, is offered in evidence and read to the jury by E. H. WOOLEY. The following is a correct copy:

Q. Were do you reside?

A. Weeping Water.

Q. How long have you resided there?

A. I have resided in town about eight years.

Q. What is your business?

A. Night watch at present.

169 Q. Who for?

A. For the town and the Missouri Pacific Company.

Q. Do you remember the accident that occurred to Mrs. Baier?

A. Yes, sir.

Q. What was your business then?

A. I was night watch for the town.

Q. Were you night watch for the railroad then?

A. No, sir.

Q. Not at that time. When did you become their night watch?

A. Soon after the accident.

Q. How soon after?

A. The first time Mr. Mann was up; perhaps a day or two. I don't remember exactly.

(By WAGGENER:)

Q. You mean Mr. Mann, the superintendent?

A. Yes, sir.

Q. Of the Missouri Pacific railway?

A. Yes, sir.

Q. Was that the same day?

A. It might have been that evening or next day. I am not positive.

Q. One or the other?

A. Yes, sir.

Q. You have been night watchman for them since then?

A. Yes, sir.

Q. State what you know about this accident and all that you saw in reference to that.

A. All I know about that I made it a practice of going to the depot every time a train came in at night. I was in the depot waiting-room at the time the train stopped at the water tank. As they started to come, and people was about, I walked to the door. They uncoupled, as usual, right in front of the door and the Omaha train ran up; got a short distance, and somebody said, "Some fel-

low is hurt." I ran up near the front, and Mrs. Baier was laid on the platform.

170 Q. Explain how they do that uncoupling.

A. Sometimes they stopped and sometimes they did not—that is, before; since they have stopped.

Q. Since that they stop?

A. Yes; generally.

Q. What do you mean by stop?

A. Come up and stand still is what I call stop.

Q. Sometimes they did not do that?

A. Yes, sir.

Q. Before this accident occurred sometimes they did not stop?

A. Yes, sir.

Q. Since this accident they have always stopped?

Waggener objected as leading.

(The COURT:) He has answered the question.

Q. That is correct, is it? You can proceed as to what you saw or know about this accident you was explaining.

A. When they start up from the water tank they will run up and stop right in front——

WAGGENER: State as to that night.

WITNESS: I am not positive.

WAGGENER: Confine yourself to what was done that night.

A. contin'd. All right. I cannot say positive whether they stopped that morning—well, or night—because I was standing back in the crowd in the door and was not paying particular attention to what they were doing, because I was not interested in the railroad then.

Cross-examined by WAGGENER:

Q. What time in the morning was this?

A. It was about 4.30.

Q. What were your duties at that time?

A. My duties? They hired me——

(WAGGENER:)

Q. Before that and at that time—that night?

A. My duties was to watch the town, look out for strangers; well, of course, you know.

171 Q. You was an officer of the town?

A. Yes; police.

Q. You say when this train left the water tank you came up?

A. I came in the door.

Q. Did you go out of the door?

A. No.

Q. What part of the train stopped in front of the door?

—. It was where the Lincoln and Omaha chair cars are coupled together.

Q. Did you see the brakeman there?

A. I did not pay any attention to the brakeman then.
Q. Do you know where he came from to uncouple the cars?
A. No; I don't.
Q. Did you see him uncouple the cars?
A. No; I did not. If I did, I did not pay attention.
Q. Did you pay attention to anything that was done at that time?
A. Not particularly at that time.
Q. Was anything done at that time which impressed your mind from which you can testify now?
A. Not that morning.
Q. You saw nothing unusual that morning that attracted your attention before the accident?
A. No, sir.
Q. After the car was coupled off how far did it go west before you saw somebody injured?
A. I think the train stopped. When I got up there the lady was laying on the platform.
Q. Did you hear her scream?
A. No, sir.
Q. How many people were on the platform?
172. A. There might have been a dozen, as near as I can judge; might have been fifteen.
Q. Did you see anybody at the rear end of the train as it pulled away and went on west?
A. I did not notice particular.
Q. Did you see the brakeman after the lady was hurt?
A. The brakeman most alway- stands there.
Q. Did you see him that night?
A. Not that I remember.
Q. Do your remember anything particular that impressed your mind except the fact of the accident?
A. No, sir; nothing unusual.

Witness excused.

Rebuttal.

OSWALD BAIER.

(Examined by TRAVIS:)

Q. You may state whether or not you were with your wife during the time she lay in the depot and in the store where her legs were cut off.
A. Yes, sir; I was right with her all the time.
Q. State whether or not you recollect of Doctor Hall being there.
A. Yes, sir; I was there when he came in.
Q. State whether or not you were there all the time Hall was there.
A. Yes, sir; all the time.
Q. State what the fact is in relation to what conversation he had with her.

A. All the conversation he had he said, "How do you do? You got hurt pretty bad."

173 Q. State whether or not Mrs. Baier told him she had jumped off of the train while it was in motion.

A. No, sir; never made such a statement. She suffered a good deal, and told him to hurry up.

Q. State whether or not she stated that any person upon the train told her not to get off.

A. No, sir; never said any such thing.

Q. Did you hear any one make any such statement as that at that time and place?

Objected to as improper rebuttal.
Sustained. Exception.

Witness excused.

La fin.

174 I, W. H. Wheeler, reporter, do hereby certify that this transcript contains all of the evidence adduced or offered on the hearing of the cause of Oswald Baier, administrator, *vs.* The Missouri Pacific Railway Company at the December term of the Otoe county district court, 1891.

January 21st, 1892.

W. H. WHEELER, *Reporter.*

175 In the District Court, Otoe County, Second Judicial District of Nebraska.

OSWALD BAIER, as Administrator of the Estate of Katherine Baier, Deceased, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Certificate to the Defendant's Bill of Exceptions.

The defendant in the above-entitled cause, in the district court of Otoe county, in the second judicial district of Nebraska, having within the time heretofore allowed by the court for that purpose reduced to writing in its bill of exceptions all of the testimony adduced or offered on both sides on the trial of the above-named cause in the above-named court, grounds therefore made to the admission of the testimony, all of the rulings of the court on such objections, and all the exceptions made and taken at the time, and having served the said bill of exceptions on the attorneys for the before-named plaintiff according to law for examination and amendment, and the same being now here before me, the undersigned judge, before whom the said cause was heard, on the motion of the attorney for the defendant that the same may be settled, allowed, signed, sealed, and made a part of the record in said cause in said court, and both parties, by their respective attorneys, being now here present and consenting thereto, I, the said judge, do

hereby certify that this the defendant's bill of exceptions contains all the testimony adduced or offered by plaintiff and defendant on the trial of said cause, all of the rulings of the court on such objecjections, and all of the exceptions to such rulings made and taken at the time.

176 Wherefore I, the said judge, do hereby settle, allow, and sign this the defendant's bill of exceptions, and do hereby order that it be made a part of the record in the said cause in the said court.

Done at Neb. City, in open court, this the 21 day of January, 1892.

SAMUEL CHAPMAN, *Judge.*

I, M. S. Campbell, clerk of the district court of Otoe county, being the second judicial district of Nebraska, do hereby certify that this is the original bill of exceptions filed in the office of the clerk of said court in said cause, and in testimony thereof I hereunto set my hand and affix the seal of said court this 21st day of January, 1892.

M. S. CAMPBELL,

[SEAL.] *Clerk of the District Court, Otoe County, Nebraska.*

To C. W. Seymour, att'y for defendant:

I herewith return the within bill of exceptions to you and suggest the following amendments to same: Should have attached thereto a certificate of the official stenographer, W. H. Wheeler; also the said bill of exceptions contains alleged requests of instructions and findings of facts which are improperly incorporated in said bill of exceptions.

The bill of exceptions present-d to me is herewith returned to you unsigned and unagreed to.

JOHN C. WATSON,
Att'y for Pl'ff.

(Endorsed:) 5271. M. P. R'y Co. *v.* Baier. Bill of exceptions. Supreme court of Nebraska. Filed Mar. 11, 1892. D. A. Campbell, clerk.

177 And on the same day, to wit, the 11th day of March, 1892, there was filed in the office of the clerk of said court a certain defendant's appearance in words and figures following, to wit:

178 In the District Court, Otoe County, State of Nebraska.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
OSWALD BAIER, Administrator of the Estate of Katherine Baier, Deceased, Defendant in Error.

The undersigned, attorneys for the defendant in error, hereby waive the issuance and service of summons in error, and *we* hereby

enter the appearance of the defendant in error to the petition of plaintiff in error filed herein.

JOHN C. WATSON,
Attorneys for Defendant in Error.

(Endorsed:) 5271. M. P. R'y Co. *v.* Oswald Baier, adm'r. Def't's appearance. Supreme court of Nebraska. Filed Mar. 11, 1892. D. A. Campbell, clerk.

179 And afterwards, to wit, on the 30th day of June, 1892, there was filed in the office of the clerk of said court a certain receipt for record in words and figures following, to wit:

180 *Receipt for Record.*

Supreme Court of Nebraska.

M. P. R'y Co. *v.* Baier. } No. 5271.

Received of the clerk of the supreme court record in the above case this 30 day of Jun-, 1892.

E. H. WOOLEY,
Attorney for Def't.

Approved:
T. L. NORVAL, *Judge.*

Supreme court of Nebraska. Record returned. Receipt cancelled. Sep. 20, 1892. D. A. Campbell, clerk.

(Endorsed:) No. 5271. Supreme court of Nebraska. M. P. R'y Co. *v.* Oswald Baier. Receipt for record. Supreme court of Nebraska. Filed Jun- 30, 1892. D. A. Campbell, clerk.

181 And afterwards, to wit, on the 8th day of July, 1892, there was filed in the office of the clerk of said court a certain proof of service in words and figures following, to wit:

182 In the Supreme Court of the State of Nebraska.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error, *v.* OSWALD BAIER, as Administrator of the Estate of Katherine Baier, Deceased, Defendant in Error.

I hereby acknowledge service of two copies of brief of plaintiff in error in the above-entitled case to have been made on me this — day of June, A. D. 1892.

JOHN C. WATSON,
Attorney for Defendant in Error.

(Endorsed:) 5271. M. P. R'y Co. *v.* Oswald Baier, adm'r. Proof of service of pl'ff's briefs. Supreme court of Nebraska. Filed Jul- 8, 1892. D. A. Campbell, clerk.

183 And afterwards, to wit, on the 29th day of June, 1893, the following judgment was rendered by said court and entered of record, to wit:

MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error, *v.* OSWALD BAIER, Administrator of the Estate of Katherine Baier, Deceased, Defendant in Error.	Error from the District Court of Otoe County. No. 5271. Judgment of Affirmance.

This cause came on to be heard, was taken up and argued by counsel; on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that said judgment be, and the same hereby is, affirmed, and that the defendant in error recover of the plaintiff in error his costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, the 29th day of June, 1893, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

184 THE MISSOURI PACIFIC RAILWAY CO. —. OSWALD BAIER, Adm'r. } No. 5271.

Filed Jun- 29, 1893.

A copy of letters of administration, when duly certified to be true and correct copies of such letters as appear from the original on file in the county court wherein such letters of administration were granted, *are* admissible in evidence with the same effect as the original.

2. A declaration, to be a part of the *res gestæ*, need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can in the ordinary course of affairs be said to be a spontaneous explanation of the real cause.

3. In an action by the administrator, under the provisions of chapter 21, Compiled Statutes, to recover damages for the death of his intestate, it is proper to prove the value of the services of the deceased which the next of kin of the deceased could reasonably expect but for the injury would have been rendered in their behalf, the natural expectancy of life of the deceased just previous to receiving the injury which resulted in her death having been duly shown.

4. The existence of negligence should be proved and passed upon by a jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial and instruct that such fact or group of facts amount to negligence *per se*. At most, the jury should duly be in-

structed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence.

5. Under the provisions of section 3, article 1, chapter 72, Compiled Statutes of Nebraska, it is only necessary to a right of recovery against a railroad company to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad. A presumption thereupon arises that such management or operation was negligent, and it can be
185 met only by showing that the injury arose from the criminal negligence of the party injured, or that the injury complained of was the result of the violation of some express rule or regulation of said railroad company actually brought to the notice of the party injured.

186 *Opinion by Ryan, C.*

The defendant in error filed his petition in the district court of Otoe county, Nebraska, alleging, in substance, that on the 26th day of December, 1889, the Missouri Pacific Railway Company received one Katherine Baier as a passenger on its said railroad from Nehawka to Lincoln; that at Weeping Water, to continue her journey, it was necessary for her to change from one of defendant's cars to another, and said railway company was thereby bound to furnish her suitable means, time, and instructions to make said change; that it failed and neglected to do its duty in these matters, and carelessly, negligently, and wrongfully performed its duty towards her in making said change; that the defendant furnished no platform for that purpose; that the ground was three or four feet below the lowest step on said car, and that the defendant then and there gave her wrong instructions about making said change, and did not give her time to make said change, in consequence whereof, when the said train stopped at the defendant's water tank, before reaching the depot at Weeping Water, the conductor of said train having wrongfully, carelessly, and negligently instructed her to get off said train, she did get off at said place, and the conductor, finding that he had made a mistake, immediately instructed her to get on again, and further instructed her to get off of said train when the next stop should be made; that afterwards said train of cars pulled by and at some distance beyond said station at Weeping Water, and the said Katherine Baier, in accordance with the instructions given her by said conductor upon the stoppage of said train of cars, attempted to get off, but by reason of said train making a sudden jerk while she was in the act of leaving said train to change to the other, which should take her to Lincoln, she was, without fault on her part, seriously injured, from the effects of which injury, on the 3rd day of January, 1890, she died;
187 that she left eight minor children, naming them, which were her only children and next of kin, and that they were dependent upon her for a mother's care and attention and had been

otherwise injured by the death of said Katherine Baier to the amount of five thousand dollars. The plaintiff in error filed a general denial, and further pleaded the defense of contributory negligence of Katherine Baier, to which answer the defendant in error filed a reply in denial.

Upon a trial of the issues had to a jury a verdict was rendered for the full amount prayed, and, a motion for a new trial being overruled, judgment was entered on the verdict; to reverse which plaintiff in error files its petition in this court.

On the trial of the case in the district court the plaintiff in error requested the court to give forty-nine instructions and asked that the jury be required to answer twenty-nine interrogatories submitted for that purpose. The petition in error in this court assigns seventy-nine alleged errors In view of these facts no attempt will be made to consider seriatim the several matters complained of in detail or in the order in which they occur.

Upon the trial there was offered in evidence and admitted over the objection of the defendant, the railroad company, a duly authenticated copy of the letters of administration upon the estate of Katherine Baier, issued in the usual form by the county court of Cass county, Nebraska, to Oswald Baier. It is insisted that the admission in evidence of this copy was error, for that it did not fall within the description of documents of which copies may be introduced under the provisions of section 408 of the Code of Civil Procedure. This section reads as follows: "Duly certified copies of all records and entries or papers belonging to any public office or by authority of law filed to be kept therein shall be evidence in all cases of equal credibility with the original records or papers so filed." The
188 certificate of the county judge by whom was issued the aforesaid letters of administration and by whom a copy thereof under his seal was authenticated recited that the said copy was a true and correct one of the letters of administration of the estate of Katherine Baier, deceased, as appeared from the original on file in said judge's office. This was sufficient to entitle said copy to consideration under the strictest construction of said section.

In argument it is insisted that it was error to permit the following question to be answered by the witness Johnson. His testimony had reference to the accident on account of which this suit was brought; following which evidence was this question and answer: "Q. Has there been any change since that time that you know of in making up trains?" Objected to as incompetent, irrelevant, and immaterial and not a proper issue in this case. Overruled and exception. "A. I don't know whether there is or not of my personal observation. I heard there had been a change." There might be imagined circumstances under which a question of this character, followed by evidence of a certain kind, would be prejudicial to the railroad company. Upon what ground the question of such prejudice is founded in this case is not apparent, for the argument of the plaintiff in error is simply that the only effect of this evidence was to prejudice the defendant. We can observe

no such necessary or even natural result of that kind which could arise upon either the question or answer of this witness.

It is insisted on argument that the district court should have sustained the motion of the railroad company to strike out all of the statements in the witness' testimony relative to what Mrs. Baier told him of the accident, because it was hearsay, no part of the *res gestæ*, and was very prejudicial to said company. The evidence complained of was given by James Johnson. It is as follows: "Q. State how you came to be there at the depot that morning. A. I brought some people down there from my house to take the train. Q. Go on and state to the jury what you saw
189 there in connection with this accident. A. I was standing on the platform in front of the depot—I think it was in the front of the depot—when the train pulled in. They stopped a few minutes in front of the depot. When they uncoupled the Lincoln car they pulled out, and a few minutes after I heard a scream. I started to run in the direction from which the scream came and run a little over a hundred feet, I think, and I found a lady laying across the platform. I picked her up—lifted her partly up—and then there was a gentleman—I think it was Fenstermaker—came with a lantern, and I saw her legs were cut off, and I think I told him he had better run for a doctor. While I was helping her up I asked her who she was, and she told me. Q. I will ask you if while you were helping her up there if the conductor came down there. A. Yes, sir. Q. Now, I will ask you to state what Mrs. Baier stated at that time as to how the accident occurred." Objected to as incompetent, irrelevant, immaterial, hearsay, and no proper foundation laid. Overruled and exception. ("Examined by Waggoner, att'y for railroad company:") "Q. Had the train gone at the time she made this statement? A. No, sir; the train had pulled up to the platform and stopped. Q. How long had the train been away from the spot where she was injured? A. I don't think the train had come to a stop when I got there. Q. How long after the scream until you heard this conversation? A. Could not have been, I think, two minutes. Q. First place Fenstermaker came with a lantern? A. Yes, sir. Q. You saw how badly she was injured? A. Yes, sir. Q. You told him to go for a doctor? A. Yes, sir. Q. He did go? A. Yes, sir. Q. You had the conversation with her after that? A. Yes, sir." (Question by court:) "Q. Was the conversation at that time? A. Yes, sir. (Examination resumed by Wooley, att'y for defendant in error:) Q. She told where she came from and who she was? A. Yes; I asked her how she came to get off of the train, and she told me her name was Baier and that she was
190 from Nehawka, and she said the conductor had told her—had come into the car when they got to Weeping Water and told them to get out at Weeping Water and change cars for Lincoln. When the train stopped at the tank she supposed it was the place and they got off; then the conductor told them it was not the station and they had better get back on the train and ride to the depot. She said she got on; but when she got on the steps the train

pulled out and her husband and children had not got on the train; and then she said when the train stopped in front of the depot she supposed it was the place to get off. She got out of the car and got on the steps, but just as she was in the act of getting off the steps the train made a jerk and she fell off." It was of the ruling upon a motion to strike out this evidence as to what Mrs. Baier said that complaint is made in argument of the plaintiff in error. It might not be improper to observe at this point that the testimony shows without question that Mrs. Baier was, immediately after the above detailed circumstances, taken to a vacant store-room in the town of Weeping Water, and that there both legs were amputated, and that from the effects of the injury she died one week after the date of the accident, of which the last witness has testified.

From the above testimony it is apparent that the statements of Mrs. Baier were made immediately after she had received her injury and before she had been removed from the place where she had sustained them, and were explanatory of the occurrence of the accident. In the brief of the plaintiff in error is cited Waldele *v.* R. R. Co., 95 N. Y., 274, in which are grouped the holdings in several decisions bearing upon the question of evidence admissible as part of the *res gestæ*. In respect to those most analogous in facts, the following language was used in said opinion, to wit: In Lund *v.* Tynesborough (19 Cush., 36) in view of the frequent recurrence of questions in regard to the admission of declarations claimed to be part of the same *res gestæ*, the court undertook to set forth and illustrate with some particularity the principles and
191 test by which such questions must be determined, and, among other things, said: "When an act of a party may be given in evidence his declarations made at the time and calculated to illustrate and explain the character and quality of the act and so connected with it as to constitute one transaction and so as to derive credit from the act itself are admissible in evidence. The credit which an act or fact gives to the accompanying declarations as a part of the transaction and the tendency of a cotemporary declaration as a part of the transaction to explain a particular fact distinguish this class of declarations from mere hearsay." And further: "Such a declaration derives credit and importance as forming a part of the transation itself and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main and principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it."

In Commonwealth *v.* Hackett (2 Allen, 136), upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out, "I am stabbed," and he at once went to him and reached him within twenty seconds after that and then heard him say, "I am stabbed; I am gone; Dan. Hackett has stabbed me." This evidence was held competent as part of the *res gestæ*. Bigelow, Ch. J., speaking of this evidence, said: "If it was a narrative statement wholly unconnected with any transaction or prin-

cipal fact it would be clearly inadmissible, but such was not its character. It was uttered immediately after the homicidal act, in the hearing of the person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that
192 the declarations or exclamations of the deceased may fairly be deemed a part of the same sentence as that which followed immediately after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the character of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances, but it was an exclamation or statement contemporary with the same transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*."

In Rockwell *v.* Taylor (41 Conn., 55) the rule was laid down thus: "To make declarations on this ground admissible they must not have been mere narrative of a past occurrence, but must have been at the time of the act done which they are supposed to characterize and have been well calculated to unfold the nature and character of the acts they were intended to explain and so harmonize with them as to constitute a single transaction."

In Hanover R. R. Co. *v.* Coyle (55 Penn. St., 396) the action was against the R. R. Co. for injury to plaintiff by negligence, and the trial court admitted the declarations of the engineer, by whose negligence the plaintiff was injured, made at the time of the injury as a part of the *res gestæ*, and it was held they were properly admitted. Agnew, J., writing the opinion and speaking of the declaration of the engineer, said: "It was made at the time of the accident, in view of the goods strewn along the road by the breaking of the boxes, and seems to have grown directly out of and immediately after the happening of the fact of negligence complained of. Being that of the engineer himself, we cannot say that his declarations made upon the spot at the time and in view of the effects of his conduct are not evidence against the company as a part of the very transaction itself."

193 In Tilson *v.* Terwilliger (56 N. Y., 273) Folger, J., lays down the rule as to *res gestæ* declarations as follows: "To be a part of the *res gestæ* they must be made at the time of the act done which they are supposed to characterize; they must be calculated to unfold the nature and quality of the acts they are intended to explain; they must so harmonize with those facts as to form one transaction. There must be a transaction of which they are considered a part; they must be concomitant with the principal fact and so connected with it as to be regarded as a result and consequence of coexisting motives."

In Chicago & West Div. R'y Co. *v.* Becker, 128 Ill., on page 548, the rule is thus stated: "The true enquiry, according to all the authorities, is whether the declaration is a verbal act illustrating, explaining, or interpreting other parts of the transaction of which it itself is a part or is merely a history or a part of the history of a

completed past affair. In the one case it is competent; in the other it is not." (Citing:) Mayes *v.* The State, 64 Miss., 329; Waldele *v.* N. Y. C. & H. R. R. Co., 95 N. Y., 274; Lander *v.* People, 104 Ill., 248.

Greenleaf says: "The principal points of attention are whether the circumstances and declaration offered in proof were contemporaneous with the main fact under consideration and whether they were so connected with it as to illustrate its character." 1 Greenleaf Ev., sec. 108.

Taylor says: "In all these cases the principal points of attention are whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form in connection with it in one continuous transaction." 1 Taylor on Evidence (seventh edition), sec. 588.

The same author, after speaking of the change in the old
194 rule where there are connecting circumstances, goes on to say: "Still an act cannot be varied, qualified, or explained either by a declaration which amounts to no more than a mere narrative of the past occurrence or of an isolated conversation held or an isolated act done at a later period."

There is not so much difficulty in the enunciation of the rule as in its application to the facts in each case under consideration. The concensus of the authorities seem to be that a declaration to be a part of the *res gestæ* need not be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. The declaration is then a verbal act and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue taken together form a continuous transaction, then the declaration is admissible. Applying these principles to the fact of the case at bar, there would seem to be no room for doubt that the declarations of Mrs. Baier made under circumstances so nearly coincident in point of time with the accident itself, explanatory of its cause and history, were admissible as part of the *res gestæ*.

There appears in the bill of exceptions the following evidence given by Oswald Baier, administrator in whose name this action was brought: "Q. What was the condition of your wife's health that morning when you left Nehawka? A. She was in good health.

"Q. State what was her condition from the time she was injured up to the time of her death. A. She had both legs amputated, and it caused her death. (On motion of defendant the words 'it caused her death' were stricken out.) Q. I will ask you what was the reasonable value of her work as housekeeper and the work she did.

Objected to as incompetent, irrelevant, immaterial, and no
195 proper foundation laid; no allegation in the petition of any damages of that character. Overruled. Exception. A. I would not miss her for $25.00 a week for these children. (On mo-

tion this answer was stricken out.) Q. What I mean, what was the work she did there in the way of saving you from having to hire a girl to do the work—what was the actual ualue of the work that was performed by her? Objected to as incompetent, irrelevant, immaterial, and not within the issues in this case and not a proper item of damages. Overruled. Exception. A. I do not think I could get anybody to do the work for less that $5.00 per week, the work that she did. The defendant moves to strike out the answer as not responsive to the question, incompetent, irrelevant, and immaterial, not within the issue in this case. Overruled. Exception."

It is argued that the court erred in admitting this evidence, first, because no special damages having been alleged specifically none such could be proved; second, because the loss of services of the wife and mother was not a proper element of damages to be considered in cases of this class. The suit was brought by Oswald Baier as administrator of his deceased wife's estate. The petition alleged that Mrs. Baier left surviving her eight children, ranging from two to seventeen years of age, who were her only children and next of kin, and that said children were dependent upon her for a mother's care and attention, and that said children had been otherwise injured by the death of Katherine Baier to the amount of five thousand dollars. This action was brought under chapter 21, Compiled Statutes of Nebraska, of which the following is a copy:

"SEC. 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect
196 thereto, then and in every such case the person who or company or corporation which would have been liable had death not ensued shall be liable to an action for damages, notwithstanding the person injured and although the death shall have been caused under such circumstances as amount in law to felony.

"SEC. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury shall give such damages as they shall deem fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: Provided that every such case shall be commenced within two years after the death of such person."

The case specially relied upon by counsel for plaintiff in error to support the contention that damages must be specially alleged is Hurst *v.* Detroit City R'y Co., 48 N. W. Rep., 44. In that case the injuries resulting in death were inflicted upon a child of the age of one year and eleven months, and the only damages alleged were the

pain, agony, and suffering endured by the said child in the interim of two hours between the injury and the death. This was under a statute much the same in terms as that above quoted, and the decision was not so much because of the failure to allege special damages as to allege no pecuniary damages whatever to the next of kin.

Another case cited for the same purpose is Penn. R. R. Co. *v.* Lilly, 73 Ind., 252, in which the victim was, at the time of her death, five years of age. The averment in the complaint was that, "By reason of the said negligent, reckless, and willful killing of the said Emma the plaintiff has been made to suffer great mental
197 pain and anguish and has been deprived of the happiness and comfort of her society and thereby has suffered great damage." It was held that the recovery by a parent for the death of his child could only be for the pecuniary damage he had sustained, the proper measure of which was the value of the child's services from the time of the injury until majority attained, taken in connection with such child's prospect of life, less the cost of support and maintenance. In a proper case a recovery could be had of the expenses for the care and maintenance of a child, funeral expenses, and medical services made necessary by the injury. This case was not merely one of a failure to properly allege special damages. It was one where no recoverable damages whatever had been stated. To the same end counsel for plaintiff in error cites Cooper *v.* L. S. M. S. R'y Co., 66 Mich., 261. For the purposes of the case under consideration the seventh syllabus of the case cited states with sufficient fullness the facts and views of the court. This syllabus is as follows; "In an action brought under How. Sts., section 8314, to recover damages for the negligent killing of a child of 11 years of age, the court instructed the jury that in assessing the damages they might allow for the services of the deceased to her parents until she arrived at the age of 21 years and might further take into consideration such other pecuniary benefits as a parent might reasonably be expected to realize had she lived for the balance of her probable duration of life, not exceeding theirs, to the latter portion of which charge exception was taken, defendant's counsel insisting that the damages should be limited to the minority of the child. Held, that the exception was well taken, and that any estimate of damage placed upon events so uncertain must be without any satisfactory basis to rest upon." Notwithstanding this criticism the supreme court of Michigan held in that case
198 that, as the jury might properly have found that the value of services *were* properly recoverable *were* equal to or in excess of the verdict ($1,550), the judgment was affirmed. At best the quoted syllabus is wholly directed rather against an indefinite instruction than a faulty pleading.

In Ragan, adm'r, *v.* R. R. Co., 51 Wis., 599, there was a general averment of damages, which was properly held insufficient, for there should have been alleged a state of facts from which pecuniary damages were inferable. The statute under which the case at bar was brought made this requirement, so that the case last cited aids but little in this enquiry. In Ohio there is a statute almost exactly

the same in terms as chapter 21, Compiled Statutes of Nebraska. Under that statute it was held that a recovery might be had of an amount which it might reasonably be expected that the next of kin would have received from the deceased had he lived the expectancy of life, being a proper subject of proof to that end. Lyons, adm'r, *v.* R. R. Co., 7 O. St., 335. The allegations of the petition upon which judgment was rendered in the case at bar more fully states the grounds of damages than was done under the same statute in Lyons, adm'r, *v.* R. R. Co., *supra*, where the petition was set out at length.

In Steele, adm'r, *v.* Kurtz, 28 O. S., 191, Ashburn, J., delivering the opinion of the court, said: "The phrase 'next of kin' is a comprehensive one. Bouvier in defining it says this term is used to signify the relations of a party who has died intestate." In general no one comes within the term who is not included in the provisions of the statute of distribution, etc. As used in the statute it comprehends all those persons who are entitled to stand in the order of inheritance under the statute of distribution in the case of personalty—"1, children; 2, husband and wife; 3, brothers and sisters, and so on." Under the statute of Nebraska regulating the distribution of personalty the same persons would be entitled to
199 shares of the personal property of the deceased as those above stated, though not in the same order. Comp. Statutes, chap. 23, secs. 30 and 176.

In Wilson *v.* Bumstead, 12 Neb., 1, it was held that an action should be brought by the administrator, Maxwell, J., who delivered the opinion of the court, saying: "The object, doubtless, was to prevent a multiplicity of suits in cases where the next of kin were numerous, and to make an equitable distribution of the amount recovered among those entitled to the same."

In Johnson *v.* Mo. Pac. R. R. Co., 18 Neb., on pages 699 and 700, occurs the following language in reference to a recovery had under this statute: "If it should appear upon the trial that the father suffered no damage in the death of the son, it is probable that there could be no recovery only for nominal damages. But it is said that the word pecuniary as used in our statute is not construed in a strict sense. The damages are largely prospective and their determination committed to the discretion of juries upon very meager and uncertain data. A parent may recover for loss of expected services of children, not only during minority, but afterwards, on evidence justifying a reasonable expectation of pecuniary profit therefrom. Neither is it essential that this expectation of pecuniary benefit should be based upon a legal or moral obligation on the part of the deceased to confer it, but it may be proved by any circumstance which rendered it probable that such benefit would, in fact, be realized."

Necessarily in the above review of authorities there could be no separate examination of the two points urged on behalf of the plaintiff in error on this branch of the case. First, of the necessity of more special pleading of damages, and, second, of the right to recover for loss of prospective services. Upon the last of these propo-

sitions, before a full examination of the authorities, the writer hereof at least entertained some doubts which have now been dis-
200 pelled. The petition, especially in the absence of a motion to make more specific and certain, stated with sufficient particularity a cause of action under chapter 21, Compiled Statutes of Nebraska, to admit evidence of damages of the character above set out. It was competent under the averments of the petition to prove any facts which would show any pecuniary loss to the next of kin of the deceased resulting from her death. There was no error, therefore, in admitting evidence of the value of the services of the deceased in connection as it was given with proof of her expectancy of life at the time she was injured.

In the instructions requested on behalf of the railroad company it was insisted that the court should instruct the jury that if they found the existence of certain facts as indicated by the instructions their verdict should be for the railroad company. This the court very properly refused to do. The existence of negligence, whether as a cause of action pleaded by the plaintiff or as a defense set up by the defendant, is a question of fact to be submitted to the jury for determination, as should be any other essential fact. A. & N. R. R. Co. *v.* Bailey, 11 Neb., 332; Johnson *v.* Mo. Pac. R. R. Co., 18 Neb., 690; Lincoln *v.* Gillilan, 18 Neb., 114; Powers *v.* Craig, 22 Neb., 621; O. & R. V. R. R. Co. *v.* Cholette, 33 Neb., 143; Stevens *v.* Howe, 28 Neb., 547; City of Plattsmouth *v.* Mitchell, 20 Neb., 228; Huff *v.* Ames, 16 Neb., 139; U. P. R'y Co. *v.* Lee Sue, 25 Neb., 772; Orleans Village *v.* Perry, 24 Neb., 831. It is doubtless proper for the court in any case to instruct the jury that certain facts, if proved, may be considered in arriving at conclusions upon the propositions involved, but in no case should there be an effort to impress upon the jury the convictions of the presiding judge as to the weight of the evidence under consideration. To single out and state a fact or group of facts and inform the jury that if such is found to exist it establishes the existence of negligence, is to comment
201 improperly upon questions of fact to the jury, and the learned judge properly refused to lend sanction to such procedure. For instance, the 40th instruction requested on behalf of the railroad company was in the following language: "40th. If the jury believe from the evidence that Katherine Baier attempted to get off after the train was in motion, in disregard of the warning of passengers not to do so, she was guilty of negligence, and plaintiff cannot recover herein." The theory of the railroad company upon the trial was that after the train left the water tank, where the conductor had directed Mrs. Baier to resume her place in the car, it had not stopped at all, but that Mrs. Baier, observing that she had been conveyed past the depot and being apprehensive that she would be carried to Omaha, alighted from the moving train and so was injured. Upon this theory the above instruction could have no other meaning than that, if after the train left the water tank Mrs. Baier "got off," in disregard of the warning of passengers, she was guilty of negligence, regardless of whether or not there was a halt such as she might well mistake for the stop, according to her statement,

indicated by the conductor as the proper time for her to leave the train. Aside from this, the instruction requested gave a certain positive weight to the warning of passengers to which such warning might or might not be entitled. If these passengers were agents of the railroad company in the management of its trains, they could, of course, speak with authority. They were not, however; they were in this matter mere volunteers, not necessarily presumed to possess better means of knowledge than Mrs. Baier herself, especially if, as she said, she had received directions from the conductor as to the course she was to pursue. The unfairness of such an instruction is apparent without comment. It is referred to simply as illustrative of the danger there is in attempting to state to the jury what fact or facts constitute negligence. The jury may
with propriety be instructed that certain facts are proper
202 for consideration in determining whether or not there has
been negligence. Whether such facts as are in evidence establish negligence is solely a question for the jury. If there is insufficient evidence to sustain a verdict, the remedy is as in other cases. No exceptional course of procedure should be adopted because the existence of negligence is involved in the facts to be determined.

The record shows that the plaintiff in error specially excepted to that portion of instruction number four given by the court which makes the defendant liable to passengers for damage sustained through accident, and to each and every other part of said instruction. The instruction complained of is as follows: "As a matter of law, you are instructed that the defendant railroad company is bound to carry its passengers without injury, and that said company is liable for damages suffered by passengers through accident while upon its trains which is not contributed to by the gross negligence of the parties injured. By gross negligence, as used in the foregoing instruction, is meant such negligence on the part of a passenger as would amount to a disregard of his or her own safety when in the presence of danger, and which would amount to willful indifference to the injury liable to follow or result from such carelessness and negligence."

Section 3, art. 1, chap. 72, Comp. Sts., reads as follows: "Every railroad company as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the original negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."

In O. & R. V. R. R. Co. *v.* Cholette, 33 Neb., 143, the following instruction was approved by this court: "The term criminal negligence, as it is used in the statute above quoted, is defined to be
gross negligence. It is such negligence as would amount to
203 a flagrant and reckless disregard of her own safety and
amount to a willful indifference to the injury liable to follow." In his definition of the term criminal negligence the district judge in the case at bar only followed that adopted by this

court. Counsel for plaintiff in error insists, however, that a rigid application of the terms of the above statutory provision was discountenanced in the opinion written by Maxwell, J., in McClary *v.* R. R. Co., 3 Neb., 44. That case was brought to recover damages caused by a sudden gust of wind blowing from the track the train upon which plaintiff was riding, the theory of plaintiff being that if the train had run on its schedule time it would have safely crossed the narrow strip devastated before the wind struck that part of the track where the wreck occurred. In the opinion it was properly said, therefore, that "common carriers are liable only where the injury has arisen from their own neglect," and as it was shown affirmatively and without question that the company was entirely free from responsibility for the injury it was held not liable in damages. The purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurers against any and all injuries while being transported upon the trains of such carriers, but it was rather intended to establish a presumption from the passenger receiving injury under the circumstances contemplated. Under this statute it is necessary to prove only that the injured person was a passenger being transported over the line of railroad of the defendant when damages are inflicted upon the person of such passenger to entitle a recovery of whatever amount of damages may be established by the evidence. In other words, these facts being shown, any damage resulting from the operation or management of the train is, without more, presumed to be entirely attributable to the negligence of the railroad company, and to avoid liability it then devolves upon such company to show
204 that the injury was imputable to the criminal negligence of the party injured or to his violation of some express rule or regulation of said road actually brought to his or her notice. As applied to the facts of the case, the 4th instruction given by the court fairly stated the correct rule as embodied in the section of the statute above quoted, and the assignment of error predicated upon the giving of that instruction must, therefore, fail.

These considerations of the 40th instruction requested by the plaintiff in error and of the 4th instruction given by the court fully meet the contentions urged against the instructions given as well as upon those refused, so that a more extended examination of either class is rendered unnecessary.

The judgment of the district court is affirmed.

Affirmed.

The other commissioners concur.

205 And afterward, to wit, on the 20th day of July, 1893, there was filed in the office of the clerk of said court a certain motion for rehearing in words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
OSWALD BAIER, Administrator, etc., Defendant in Error.
} Motion for Rehearing.

Now comes the said plaintiff in error and moves the court to grant a rehearing and to reconsider the opinion filed herein for the following reasons, to wit:

I.

Because no opinion has been filed in this case by the supreme court of this State or any judge thereof.

II.

Because the opinion filed appears to have been written by Ryan, commissioner, and concurred in by the other commissioners, and the petition in error does not appear to have been considered by the supreme court or any judge thereof, nor does the opinion filed herein bear the concurrence of the supreme court or any judge thereof.

III.

Because under the constitution of the State of Nebraska, by article 6, section 1, "the judicial power of this State shall be vested in a supreme court, district courts, county courts, justices of the
206 peace, police magistrates, and any such other courts inferior to the district courts that may be created by law for cities and incorporated towns," and by section 2 it is provided, "The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum or to pronounce a decision," and under and by virtue of said constitutional provisions the said plaintiff in error was entitled to have its said petition in error considered and determined by the supreme court of this State and not by a board of commissioners.

IV.

Because the act of the legislature creating a board of supreme court commissioners and authorizing the appointment of persons to fill such position is unconstitutional and void, and such act of the legislature and such appointment does not confer upon said board of commissioners any power or authority to hear, try, and determine controversies which should be heard, tried, and determined by the supreme court of the State under the constitution.

V.

Because the opinion in this case has been filed by a person styling himself commissioner, and it does not appear that the same has been considered by the supreme court of the State, or that the supreme court has filed any opinion herein affirming the judgment of the

court below, and the said plaintiff in error is entitled to have the several assignments of error considered and determined by the supreme court of the State rather than by a board of commissioners.

VI.

Because the opinion filed herein entirely ignores many assignments of error which were specially and particularly presented by the plaintiff in error and asked to be considered by this court.

207 VII.

Because the plaintiff in error insisted that under the uncontradicted evidence in the court below the said deceased, Catherine Baier, was guilty of gross criminal negligence, and her personal representatives could not recover herein for her death, and the learned commissioner who filed the opinion in this case entirely ignores such claim and contention of plaintiff in error and passes the same by without any notice whatever.

VIII.

Because an examination of the record herein will disclose the fact that from the uncontradicted and undisputed evidence in the case Catherine Baier, after the said train of cars had left the station platform, in disregard of the admonition of persons standing by her, jumped from said train at a time when it was obviously dangerous for her to do so, and in consequence thereof received the injuries complained of, but which fact is entirely ignored by the learned commissioner who files the opinion herein.

IX.

Because the learned commissioner who filed the opinion herein has seen fit to adopt a rule for the purpose of fixing a liability upon the plaintiff in error, The Missouri Pacific Railway Company, whereas this court, in its opinion filed April 11, 1893, in the case of The Chicago, Burlington & Quincy Railroad Company *vs.* Landauer, has adopted another and different rule for the Burlington Company, and the said plaintiff in error insists that it is entitled to have the same rule of law applied to it as is applied to other railroads in the State of Nebraska.

X.

Because the court in the case of Chicago, Burlington & Quincy Railroad Company *vs.* Landauer adopted the following rule, namely:

208 It is the settled rule in this State that where different minds may draw different inferences from the same state of facts as to whether such facts establish negligence it is a proper question for the jury and not for the court; but that rule is subject to qualification that the inference of negligence must be a reasonable one. Where it is impossible to infer negligence from the established facts

without reasoning irrationally and contrary to common sense and the experience of average men it is not a question for the jury, and the court should direct a verdict for the defendant. Yet the learned commissioner who filed the opinion in this case entirely ignored this salutary principle of law and affirmed the judgment of the court below without even giving the question presented by counsel for plaintiff in error a passing consideration.

XI.

Because the court has held in the case of The Chicago, Burlington & Quincy Railroad Company *vs.* Landaurer that "a new trial should be allowed when it is clear that material uncontradicted evidence has been disregarded by the jury, and which, if considered and given due weight, would have required a different verdict from that returned." Yet, notwithstanding which rule, the learned commissioner does not in the opinion filed herein affirming the judgment of the court below refer to the fact that the uncontradicted and undisputed evidence discloses the fact that the said Catherine Baier, while the train was in motion after it had left the depot, jumped therefrom under such circumstances as to render it obviously and necessarily perilous and to show a willful disregard of the danger incurred thereby.

XII.

Because the learned commissioner in the opinion states that, in view of the fact "the plaintiff in error requested the court to
209 give forty-nine instructions and asked that the jury be required to answer twenty-nine interrogatories submitted for that purpose and the petition in error assigning seventy-nine alleged errors," the learned commissioner would "not attempt to consider seriatim the several matters complained of in detail or in the order in which they occur." Without thereafter passing upon the question whether the seventy-nine alleged errors were properly assigned or not the learned commissioner took up and discussed three or four questions in the case and affirmed the judgment of the court below without saying whether the other errors assigned were well taken or not, and the said plaintiff in error was entitled to a fair consideration of each error assigned, unless the court should be of the opinion that the assignments of error were frivolous.

XIII.

Because the learned commissioner, in passing upon the competency of the evidence given by Oswald Baier on the question of damage, seems to entirely misapprehend the position assumed by plaintiff in error relative to the competency of this evidence and holds it competent upon an entirely erroneous theory and states that it was competent under the averments of the petition to show any fact which would show and pecuniary loss to the next of kin of the deceased resulting from her death. There was no error, therefore, in admitting evidence of the value of the services of the de-

ceased in connection, as it was given, with proof of her expectancy of life at the time she was injured, whereas the contention of the plaintiff was that this item of damage could not be shown by permitting the witness to testify, "I don't think I could get anybody to do the work for less than five dollars per week—the work that she did."

XIV.

Because the learned commissioner wholly ignored the rule of evidence relative to the proof of such facts, and did not in the
210 opinion filed herein pass upon the question made relative to the competency of such evidence.

XV.

Because the learned commissioner selects out instruction No. 40 asked for by plaintiff in error and then proceeds to show wherein such instruction was faulty and should not have been given, but entirely ignores the request to give the other instructions, none of which were as faulty in their wording and grammatical construction as instruction No. 40, the learned commissioner stating that such instruction No. 40 was referred to "simply as illustrative of the danger there is in attempting to state to the jury what fact or facts constitute negligence." Yet the learned commissioner does not find it necessary to make such criticism upon instructions number 8 and 10 given at the instance of the plaintiff in the court below, which singles out a fact which the court stated would constitute a liability on the part of the defendant.

XVI.

Because the learned commissioner states in the opinion filed that "the jury may with propriety be instructed that certain facts are proper for consideration in determining whether or not there has been negligence; whether such facts as are in evidence establish negligence is solely a question for the jury," but fails to apply this rule in behalf of the plaintiff in error as to the instruction given by the court below as follows:

"10. Should you, however, find that in obedience to the direction of the conductor, upon the train halting at the depot platform, the deceased attempted to alight therefrom, and that she did not have sufficient time to do so on account of the train pulling out while she was in the act of disembarking, and she was injured in consequence, then, in case you so find, the defendant would be liable, for
211 the act of the deceased in attempting to alight from the train under such circumstances would not amount to gross negligence within the meaning of the law as defined by this instruction."

XVII.

Because the learned commissioner in the opinion filed herein passes by the argument injected into instruction No. 10 and sub-

mitted to the jury in the court below as a rule for their guidance and direction in arriving at a verdict.

XVIII.

Because the court below, in its instruction No. 10, did not say to the jury that such facts might be considered by them in arriving at conclusions upon the propositions involved; but told the jury that certain facts would not amount to gross negligence. But the learned commissioner did not see fit, in the consideration of this question, to apply the rule laid down in the opinion filed herein as applicable to the instructions given by the court below, but only as applicable to the most faulty instruction asked by the defendant in the court below, which was referred to "simply as illustrative" of the proposition made.

XIX.

Because the learned commissioner, in the opinion filed herein, entirely ignores the proposition made by the plaintiff in error that section 1, article 1, page 72, Compiled Statutes, was unconstitutional and void, and denied to the defendant the equal protection of the law, and thorefore in violation of the fourteenth amendment of the Constitution of the United States, and does not in the opinion filed herein refer to this point or give the same any consideration whatever, and the plaintiff in error was entitled to at least a fair consideration of so important a question as is involved in this controversy.

212 XX.

Because the learned commissioner entirely ignores the proposition that, this being an action to recover damages for causing the death of Catherine Baier, it could not be maintained under and by virtue of section 1 of chapter 21, Compiled Laws of Nebraska, page 399, which provides, as a necessary predicate for the action, that the death must have been caused by the wrongful act, neglect, or default of another, and said plaintiff was entitled to an expression of opinion by this court upon that question, for the reason that if the proposition contended for by plaintiff in error was correct, then in no event could there be a recovery in this action.

XXI.

Because the learned commissioner, in the opinion filed, does not consider the objection made to any of the instructions given by the court below except instruction No. 4, whereas instruction No. 10 was the most prejudicial instruction given by the court below to the jury.

XXII.

Because the learned commissioner selected instruction No. 40, requested by the defendant in the court below, the same being the most faulty instruction asked, and closes the opinion filed herein

by saying, "These considerations of the fortieth instruction requested by the plaintiff in error and of the fourth instruction given by the court fully meet the contentions urged against the instructions given as well as upon those refused, so that a more extended examination of either class is rendered unnecessary."

XXIII.

Because the foregoing statement the learned commissioner has evidently misread or misapprehended the force and effect of the matters and things contained in the transcript and record filed herein; otherwise such statement would not have been con-
213 tained in the opinion filed.

XXIV.

Because the learned commissioner in the opinion filed herein entirely ignores instructions numbers 5, 6, 7, 8, 9, and 10 given by the court below, each and all of which it is contended were misleading, prejudicial, submitted to the jury other and different issues of fact than those made by the pleadings, prevented the plaintiff in error from having a fair and impartial consideration of the case, and each and all contrary to the established rules of law governing such controversies.

XXV.

Because the learned commissioner did not consider or pass upon instruction number one (Record, 8) asked by the railway company, to the effect that under the pleadings and evidence the plaintiff could not recover, and thereby entirely ignored the rule laid down and established by this honorable court in the case of Chicago, Burlington & Quincy Railroad Company *vs.* Landauer, opinion filed April 11, 1893.

XXVI.

Because the learned commissioner refused and neglected to consider the proposition as contended for by plaintiff in error as contained in instruction No. 5, to the effect that the plaintiff could not recover upon any other or different ground of negligence than such as are specifically alleged and set forth in the plaintiff's petition.

XXVII.

Because the learned commissioner neglected to consider or in any manner pass upon the proposition as asked by plaintiff in error in the court below by instruction No. 6, to the effect
214 that "negligence to be actionable must be the proximate cause of the injury complained of, and before the defendant can be held responsible for any of the said matters and things so alleged in said petition the jury must find that the same proximately contributed to the injury complained of."

X-VIII.

Because the learned commissioner neglected and refused to consider instruction No. 9, asked for by plaintiff in error and refused by the court below (Record, 10).

XXIX.

Because the learned commissioner neglected and refused to consider the proposition, as contained in instruction No. 8 (Record, 10), which was necessary for the jury to fairly consider the evidence introduced on the trial of said case and involved in the issue made by the pleadings and by the evidence.

XXX.

Because the learned commissioner neglected and refused to consider instruction No. 10, asked for by plaintiff in error and refused by the court below (Record, 10), which refusal of the learned commissioner is in conflict with the rule laid down by this court in the case of Chicago, Burlington & Quincy Railroad Company *vs.* Landauer, cited *supra.*

XXXI.

Because the learned commissioner, in his criticism of instruction No. 40, says: "Upon this theory the above instruction could have no other meaning than that if after the train left the water tank Mrs. Baier got off in disregard of the warning of passengers she was guilty of negligence, regardless of whether or not there was a halt such as she might well mistake for the stop, according to her
215 statement, indicated by the conductor as the proper time for her to leave the train." But the learned commissioner in that connection does not refer to instruction No. 11, asked by plaintiff in error and refused by the court below, as follows:

"The jury are instructed that the defendant claims that after said train had passed the train, or as it was passing the depot, the said Catherine Baier got up and left her seat in the car and was out on the platform or steps of the car while it was in motion, and that while in that position one or more of the passengers on said train told her in substance not to jump, that the train would stop, but, disregarding such notice and warning and without any notice or knowledge of those in charge of said train, she stepped or jumped from the same while it was in motion and received the injuries complained of, and that therefore she was guilty of contributory negligence and was alone responsible for her injuries; and on this the court instructs the jury that if the foregoing statement of the facts is true, then the plaintiff cannot recover in this action and your verdict should be for the defendant."

XXXII.

Because the learned commissioner does not consider and entirely ignores the proposition contained in instruction No. 14 asked by

plaintiff in error, and which proposition was not only involved in the issue, but necessary for a fair consideration of the case by the jury under the evidence.

XXXIII.

Because the learned commissioner neglected and refused to consider instruction No. 15 asked by the plaintiff in error, which contains a correct proposition of the law — was involved in the issues necessary for a fair consideration of the case.

XXXIV.

216 Because the learned commissioner refused to consider the proposition contained in instruction- No. 16 and No. 17 asked by the plaintiff in error, each of which *were* involved in the issue and necessary for a fair consideration of the case.

XXXV.

Because the learned commissioner neglected and refused to consider the proposition involved in instruction No. 18 asked by plaintiff in error, which presented a proposition necessarily involved in the issues made and which was necessary for a fair consideration of the case by the jury.

—.

Because the learned commissioner refused to consider the proposition contained in instruction No. 19, which instruction presents the law of such matters as laid down by the supreme court of this State and which was necessary to a fair consideration of the case by the jury in the court below, as also instruction No. 20.

XXXVII.

Because the learned commissioner refused to consider instruction number 21 asked by plaintiff in error in the court below.

XXXVIII.

Because the learned commissioner neglected and refused to consider the proposition contained in instruction No. 24 asked by plaintiff in error in the court below, and which was necessary for a fair consideration of the case by the jury and was necessarily involved in the issue presented by the pleading.

XXXIX.

Because the learned commissioner refused and neglected to consider the proposition contained in instruction No. 25, which was involved in the issues and necessary for a consideration of the case by the jury in the court below.

XL.

Because the learned commissioner refused to consider the
217 proposition contained in instruction No. 28.

XLI.

Because the learned commissioner refused to consider instruction No. 29 and entirely ignored the proposition contained in said instruction, and because the learned commissioner in the opinion filed herein in criticising instruction No. 40 does not refer directly or indirectly to the proposition as contained in instructions numbers 28 and 29.

XLII.

Because the learned commissioner refused to consider the proposition as contained in instructions numbers 30, 31, 32, and 33, which instructions were asked by the plaintiff in error in the court below and refused.

XLIII.

Because the learned commissioner refused to consider the propositions contained in instructions numbers 34, 35, 36, 37, 38, 39, 41, and 42.

XLIV.

Because the learned commissioner refused to consider the propositions contained in either instructions numbered 43, 44, 45, 46, 47, 48, or 49, each of which contain- propositions of law necessary for the jury to arrive at a fair determination of the matters and things in controversy between the plaintiff and the defendant.

XLV.

Because on the evidence as contained in the record the deceased, Catherine Baier, was guilty of gross criminal negligence, and the injury to her was the result of such negligence on her part, and the learned commissioner has entirely ignored the matters and things contained in the record, so far as the rights and obligations of the respective parties hereto are concerned.

218 XLVI.

Because the plaintiff in error is entitled to a new trial herein for the many errors committed in the court below, which have been entirely ignored by the learned commissioner in the opinion filed herein.

Wherefore, and by reason of the matters and things hereinbefore contained, The Missouri Pacific Railway Company, plaintiff in error, respectfully asks a rehearing and reconsideration of this case by this court, to the end that substantial justice may be done and the said plaintiff in error restored to all things that it has lost by reason of the matters and things not being fully considered by the learned commissioner who filed the opinion herein.

A. R. TALBOT,
B. P. WAGGENER,
Attorneys for Plaintiff in Error.

(Endorsed:) 5271. The Mo. Pac. R'y Co. *vs.* Oswald Baier, adm'r, etc. Motion for rehearing. Supreme court of Nebraska. Filed July 20, 1893. D. A. Campbell, clerk.

219 And afterwards, to wit, on the 22nd day of September, A. D. 1892, there was filed in the office of the clerk of said court a certain attorney's lien in words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
OSWALD BAIER, Administrator, Defendant in Error.

The undersigned, E. H. Wooley, hereby claims an attorney's lien upon the judgment recovered in this action in the sum of three hundred fifty ($350.00) dollars.

E. H. WOOLEY.

(Endorsed:) 5271. M. P. R'y Co. *vs.* Oswald Baier, adm'r. Att'y's lien. Supreme court of Nebraska. Filed Sep. 22, 1893. D. A. Campbell, clerk.

220 And afterwards, to wit, the 21st day of October, 1893, there was filed in the office of the clerk of said court a certain notice in words and figures following, to wit:

OSWALD BAIER, Administrator, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILROAD COMPANY, Defendant. } Attorney's Lien.

To The Missouri Pacific Railroad Company, defendant:

I hereby notify you that I have and claim an attorney's lien for $670.00 upon the judgment heretofore rendered in the district court of Otoe county, Nebraska, in favor of plaintiff, as attorney in said cause, said services being rendered in and about the procuring of said judgment. You will retain the amount, $670.00, in your hands to be paid to myself as said attorney.

H. D. TRAVIS,
Attorney for Plaintiff.

(Endorsed:) 5271. Oswald Baier, administrator, *vs.* The Missouri Pacific Railway Company. Notice of attorney's lien. B. P. Waggener, Chas. Seymour, F. P. Ireland, att'ys M. P. R. R. Co., attorneys for defendant. Supreme court of Nebraska. Filed Oct. 21, 1893. D. A. Campbell, clerk. H. D. Travis, attorney for plaintiff.

221 And afterwards, to wit, on the 18th day of October, A. D. 1893, the following order was made by said court and entered of record, to wit:

MISSOURI PACIFIC RAILWAY COMPANY
v.
OSWALD BAIER, Adm'r of the Estate of Katherine Baier, Deceased.

Error from the District Court of Otoe County. No. 5271.

This cause came on to be heard upon a motion by the plaintiff for a rehearing; on consideration whereof it is ordered by the court that said motion be, and the same hereby is, overruled at the costs of the plaintiff, taxed at $——, and that a mandate issue accordingly.

(Here follows diagram marked p. 222.)

223 Know all men by these presents that we, The Missouri Pacific Railway Company, a corporation, as principal, and George J. Gould, of the city of New York, State of New York, as surety, *and* are held and firmly bound unto Oswald Baier, as administrator of the estate of Katherine Baier, deceased, in the just and full sum of ten thousand dollars ($10,000), to be paid to the said Oswald Baier, as administrator, his successors, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, the said principal and its successors, and I, the said surety, my heirs, executors, administrators, or assigns, bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of November, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at the September term, A. D. 1893, of the supreme court of the State of Nebraska, in a proceeding pending in said court between The Missouri Pacific Railway Company, plaintiff in error, and Oswald Baier, as administrator of the estate of Katherine Baier, deceased, defendant in error, an order and judgment was rendered and entered against said plaintiff in error, and the said plaintiff in error having sued out a writ of error from the Supreme Court of the United States to the said supreme court of the State of Nebraska to reverse the said judgment in the proceeding, and a citation to the said defendant in error, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at the city of Washington, District of Columbia, within thirty days after the date of said citation:

Now, the condition of the above obligation is such that if the said The Missouri Pacific Railway Company, a corporation, shall prosecute said writ of error to effect and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; otherwise to remain in full force and virtue.

224 THE MISSOURI PACIFIC RAILWAY COMPANY,
[SEAL.] By GEORGE J. GOULD, *President.*

Attest: GUY PHILLIPS, *A Pt. Sec'ty.*

Sealed and delivered in presence of—
D. D. DUNCAN.

The foregoing bond is approved.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Nov. 16th, 1893.

UNITED STATES OF AMERICA, }
City, County, and State of New York, } *ss:*

George J. Gould, who executed the foregoing bond, being duly sworn, says that he is a resident of the State of New York and a householder in the said State and is worth the sum of $10,000 over and above all the debts and liabilities he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

GEORGE J. GOULD.

Sworn to and subscribed before me this 15th day of November, 1893.

[SEAL.]

B. W. J. FOX,
Notary Public, Kings & New York Counties.

(Endorsed:) The Missouri Pacific Railway Company, pl'ff in error, *vs.* Oswald Baier, as administrator of the estate of Katherine Baier, deceased. Supersedeas bond. Supreme court of Nebraska. Filed November 23, 1893. D. A. Campbell, clerk.

225 I, D. A. Campbell, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of The Missouri Pacific Railway Company *v.* Oswald Baier, administrator of the estate of Katherine Baier, deceased, as fully as the same remains on file and of record in my office.

I further certify that on the 23rd day of October, 1893, a mandate was issued out of said supreme court directed to the district court of Otoe county, commanding the said district court to cause execution to issue carrying into effect its judgment heretofore rendered in this cause in the manner provided by law.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of said court, at the city of Lincoln, this 24th day of November, A. D. 1893.

[Seal Supreme Court of Nebraska.]

D. A. CAMPBELL,
Clerk Supreme Court.

226 UNITED STATES OF AMERICA, *ss:*

To Oswald Baier, as administrator of the estate of Katherine Baier, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Nebraska, wherein The

Missouri Pacific Railway Company is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 16th day of November, in the year of our Lord one thousand eight hundred and ninety-three.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

NEBRASKA CITY, OTOE COUNTY, STATE OF NEBRASKA,
November 23d, 1893.

I hereby accept service of a copy of the above citation.

JOHN C. WATSON,
Attorney for Oswald Baier, as Administrator of the Estate of Katherine Baier, Deceased, Defendant.

227 [Endorsed:] 5271. The Missouri Pacific Railway Company, pl'ff in error, *vs.* Oswald Baier, as administrator of the estate of Katherine Baier, deceased. Citation. Supreme court of Nebraska. Filed Dec. 9, 1893. D. A. Campbell, clerk.

228 I, D. A. Campbell, clerk of the supreme court of the State of Nebraska, do certify the above and foregoing to be the original citation issued by Honorable David J. Brewer, associate justice of the Supreme Court of the United States, together with acceptance of service thereof by the defendant in error in the case of The Missouri Pacific Railway Company, plaintiff in error, against Oswald Baier, as administrator of the estate of Katherine Baier, deceased, as the same appears of record in my office.

[Seal Supreme Court of Nebraska.]

D. A. CAMPBELL,
Clerk of Supreme Court of Nebraska.

229 [Endorsed:] Case No. 15,462. Supreme Court U. S., October term, 1893. Term No., 1078. The Missouri Pacific Railway Co., P. E., *vs.* Oswald Baier, adm'r, &c. Citation & proof of service.

[Stamped:] Office Supreme Court U. S. Filed Dec. 15, 1893. James H. McKenney, clerk.

Endorsed on cover: Case No. 15,462. Nebraska supreme court. Term No., 1078. The Missouri Pacific Railway Company, plaintiff in error, *vs.* Oswald Baier, as administrator of the estate of Katherine Baier, deceased. Filed December 5, 1893.

FILED
FEB 16 1894
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM. 1893.

No. 1078.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

OSWALD BAIER, AS ADMINISTRATOR OF THE ESTATE OF KATHER-BAIER, DECEASED,
Defendant in Error.

In Error to the Supreme Court of Nebraska.

Motion of Defendant in Error to Dismiss Writ of Error and to Affirm Judgment of State Supreme Court.

JOHN C. WATSON,
E. H. WOOLEY,
H. D. TRAVIS,
Attorneys for Defendant in Error, and of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

OSWALD BAIER, as Administrator of the Estate of Katherine Baier, deceased,
Defendant in Error.

No. 1078.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

Motion to Dismiss Writ of Error, and to Affirm Judgment of the State Supreme Court.

Now comes Oswald Baier, Adm'r., etc., the Defendant in Error in the above entitled cause, by John C. Watson, E. H. Wooley and H. D. Travis, his attorneys, who appear for the purpose of making this motion, and for no other purpose, and move the court to dismiss the writ of error herein and to affirm the judgment of the Supreme Court of the State of Nebraska for the following reasons to-wit:—

1. That the record shows that this court has no jurisdiction of above entitled cause.

2. That the record shows there is no federal question involved in said cause.

3. That it does not appear affirmatively on the face of the record that a federal question was raised and presented to the highest court of the State for decision and decided, or that its decision was neces-

sary to the judgment rendered in the case.

4. That it is manifest from the record that the writ of error was taken for delay only.

5. That the record shows that the question on which the jurisdiction depends, if any, is so frivolous as not to need further argument.

JOHN C. WATSON,
E. H. WOOLEY,
H. D. TRAVIS,
Attorneys for Defendant in Error,
and of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

OSWALD BAIER, as Administrator of the Estate of Katherine Baier, deceased,
Defendant in Error.

No. 1078.

STATEMENT OF THE CASE AND BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM THE JUDGMENT OF THE STATE SUPREME COURT.

Statement of the Case:

The defendant in error filed petition in the district court of Otoe County, Nebraska, alleging in substance, that on the 26th day of December, 1889, the Missouri Pacific Railway company received one Katherine Baier as a passenger on its said railroad from Nehawka to Lincoln; that at Weeping Water, to continue her journey, it was necessary for her to change from one of defendant's cars to another, and said railroad company was thereby bound to furnish her suitable means, time and instructions to make said change; that it failed and neglected to do its duty in these matters; and carelessly, negligently, and wrongfully performed its duty towards her in making said change; that the defendant furnished no platform for that purpose; that the ground was three or four feet below the lowest step of said car, and that the defendant then and there gave her wrong instructions about making said change, and did not give her time to make said change, in consequence whereof, when the said train

stopped at defendant's water tank before reaching the depot at Weeping Water, the conductor of said train having wrongfully, carelessly and negligently instructed her to get off said train, she did not get off at said place, and the conductor finding that he had made a mistake, immediately instructed her to get on again, and further instructed her to get off of said train when the next stop should be made; that afterwards said train of cars pulled up and at some distance beyond the station at Weeping Water, and the said Katherine Baier, in accordance with the instructions given her by the said conductor, upon the stoppage of said train of cars attempted to get off, but by reason of said train making a sudden jerk, while she was in the act of leaving said train to change to the other which should take her to Lincoln she was without fault on her part seriously injured, from the effects of which injury, on the 3rd day of January, 1890, she died; that she left eight minor children, naming them, which were her only children and next of kin, and that they were dependent upon her for a mother's care and attention, and had been otherwise injured by the death of said Katherine Baier to the amount of $5,000. The plaintiff in error filed a general denial, and further pleaded the defense of contributory negligence of Katherine Baier, to which answer the defendant in error filed a reply in denial. Upon a trial of the issues had to a jury, a verdict was rendered for the full amount prayed, and a motion for a new trial being overruled, judgment was entered on the verdict, to reverse which plaintiff in error filed his petition in the supreme court of the State, where the judgment of the trial court was affirmed. Thereafter a motion for a re-hearing of the cause was filed, which was denied by the State Supreme Court. Thereupon the plaintiff in error sued out a writ of error to the Supreme Court of the State of Nebraska, to dismiss which, and to affirm the judgment of said Court, the defendant in error files his motion.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR:—

There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the

writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument. Par. No. 5, Rule 6, Rules of the Supreme Court of the United States.

Whitney vs. Cook, 99 U. S. 607;
Hinckley vs. Morton, 103 U. S. 764;
Micas vs. Williams, 104 U. S. 556;
Swope vs. Leffingwell, 105 U. S. 3;
Chanute City vs. Trader, 132 U. S. 210.

The record nowhere shows a federal question to be involved in this case. Where the judgment of the state court is based upon general rules of law and local statutes, and does not involve a federal question, the supreme court of the United Stated has no jurisdiction to review it.

Giles vs. Little, et al., 10 Sup. Ct. Rep. 623.

The decisions of the state courts upon questions of general public law are not reviewable in the supreme court of the United States.

Delmas vs. Ins. Co., 14 Wall. 661;
Tarver vs. Keach, 15 Wall. 68;
New York Life Ins. Co. vs. Hendren, 92 U. S. 286;
Dugger vs. Bocock, 104 U. S. 596;
Allen vs. McVeigh, 107 U. S. 433; S. C. 2 Sup. Ct. Rep. 558.

It is the settled rule of this court, by a long line of cases, to follow the decisions of the state courts, giving constructions to the laws and constitutions of their own states.

When the ground of jurisdiction is that the state court sustained the validity of a state statute, which was drawn in question as repugnant to the constitution of the United States, a definite issue as to such repugnancy must be distinctly deducible from the record before the state court.

In Powell, et. al. vs. Supervisors of Brunswick County, et al., 14 Supreme Court Reporter 166, Mr. Chief Justice Fuller, speaking for the court, said: — "As many times reiterated, it is essential to the maintenance of jurisdiction upon the ground of erroneous decision as to the validity of the state statute, or a right under the constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question as repugnant to the constitution, and that the decision sustained its validity, or that the right was especially set up, or claimed and denied. If it appear from the record, by clear and necessary intendment, that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the state, as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered. A definite issue as to the validity of the statute, or the possession of the right, must be distinctly deducible from the record, before the state court can be held to have disposed of such a federal question by its decision. The bill of complaint in this case nowhere claimed relief by reason of any right, title, privilege, or immunity under the constitution of the United States, or because of the violation by the proceedings in reference to the subscription of any provision of that constitution, nor did the petition in error to the court of appeals suggest any federal question; *but, in a supplemental brief filed in that court*, it was urged the property owners would be deprived of their property 'without due process of law;' in violation of the fourteenth amendment."

This the court held was not sufficient to raise a federal question.

In the case at bar the state decision involved no question of federal law, and is not reviewable here. The defense resting on the

construction to be given to the state statute, the constitutionality of which was not questioned, does not present a federal question.

Santa Cruz County Supervisors vs. Santa Cruz Railroad Company, 111 U. S. 361.

To give this court jurisdiction of a writ of error for the review of a judgment of a state court, it must appear affirmatively, not only that a federal question was raised and presented for decision to the highest court of the state having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered. The cases to this effect are numerous.

Murdock vs. Memphis, 20 Wall. 590, 636;
Chouteau vs. Gibson, 111 U, S. 200.
Adams Co. vs Burlington, etc., R. R. Co., 112 U. S. 123.

Where, in the State court, the Federal question raised was not, and need not have been, decided on non-federal questions, this court has no jurisdiction.

Crossley vs. City of New Orleans, 108 U. S. 105.

To give this court jurisdiction to review a judgment from a state court, the record must show affirmatively, or by fair implica-

tion, that some federal question was involved which was necessary to the determination of the cause.

Boughton vs. Exchange Bank, 104 U. S. 427.

This court cannot re-examine the judgment or decree of a state court simply because a federal question was presented to that court for determination. It must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as rendered.

Bolling vs. Lersner, 91 U. S. 594.

Where the record does not show that a Federal question was raised, though the petition for allowance of the writ of error alleges that such a question was relied upon, this court has no jurisdiction. It must appear in the record.

Warfield vs. Chaffe et al., 91 U. S. 690.

This court will not take jurisdiction where the judgment of a State court involves a Federal question, if there be distinct and sufficient ground to support the judgment upon non-federal questions.

Kennebeck R. R. vs. Portland R. R., 14 Wall. 23.

Where the plaintiff in error, in his pleadings and in his argument in this court, assails a State statute as unconstitutional, but the defendant claims nothing under the statute and it is not involved in the judgment, this court has no jurisdiction.

Northern Railroad vs. The People, 12 Wall. 334.

A statement in a writ of error to the effect that a Federal question is involved will not give this court jurisdiction, if in fact such question does not appear in the record.

Attorney-General vs. Federal Street Meeting House, 1 Black, 262.

In the case of Clark vs. Hancock, 94 U. S. 493, the court said: "In the present crowded state of our docket it becomes us to be especially careful that our jurisdiction is not invoked for delay merely; and when the record is presented in such a form that we can, without too great inconvenience, inform ourselves of the questions to be decided, we shall be inclined to receive applications of this kind. IN THE PRESENT CASE WE HAVE A PRINTED RECORD, AND IT IS EVIDENT WE HAVE NO JURISDICTION."

In the case at bar the record nowhere discloses any federal question. *In fact at no time was any federal question raised or presented to the state court until the plaintiff in error, in the State Supreme Court, filed its motion for a rehearing*, and claimed that Section 3, Article 1, Chapter 72, Compiled Statutes of Nebraska, was "in contravention of the constitution of the United States, and denies to Railroad Companies the equal protection of the law."